IN THE INCOME TAX APPELLATE TRIBUNAL "A", BENCH KOLKATA

BEFORE SHRI A. T. VARKEY, JM &DR. A.L.SAINI, AM

आयकरअपीलसं./ITA No.85/Kol/2020

(निर्धारणवर्ष / Assessment Year:2012-13)

M/s Mrinalini Biri Manufacturing Co **P-43, Rabindra Sarani, Kolkata-700001.**	**Vs.**	**DCIT, Circle-8(1), Kolkata**
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: **AACCM 1686 P**		
(Appellant)	**..**	**(Respondent)**

Appellant by : Shri A. K. Tulsiyan, FCA
Respondent by :Shri Dhrubajyoti Roy, JCIT

सुनवाईकीतारीख/ **Date of Hearing** **: 27/07/2020**

घोषणाकीतारीख/**Date of Pronouncement** **: 16/09/2020**

आदेश / O R D E R

Per Dr. A.L. Saini, AM:

The captioned appeal filed by the assessee, pertaining to assessment year 2012-13, is directed against the order passed by the Commissioner of Income Tax (Appeal)-18, Kolkata, in appeal no. CIT(A)-Kolkata-18/10117/2017-18/2019-20/, which in turn arises out of an assessment order passed by the Assessing Officer under section 143(3) of the Income Tax Act, 1961 (in short the "Act") dated 17/03/2015.

2. The grounds of appeal raised by the assessee are as follows:

1. That the ld. CIT(A) was wrong in confirming the action of the ld. Assessing Officer in making disallowance of Rs. 4,68,092/- u/s 36(1)(v) on account of unapproved Gratuity Expenses. The same was paid to LIC under Employees Group Gratuity Scheme. The said fund was created exclusively for the benefits of Employee of the appellant company. As such the fund was created wholly and exclusively for the purpose of Business and should be allowed u/s 37(1). Therefore, the said disallowance is completely unjustified and needs to be deleted.

2. That the ld. CIT(A) was wrong in confirming the action of the ld. Assessing Officer in making disallowance of Rs. 16,22,702/- u/s 40(a)(ia) on account of non-deduction of TDS. The same should be restricted to 30% of the disallowance i.e. 4,86,811/- in view of the recent amendment in section 40(a)(ia). The ld. CIT(A) failed to consider the fact that the said amendment is curative in nature and comes into rescue whenever the disallowance u/s 40(a)(ia) is warranted. Therefore, the said amendment should be treated as retrospective amendment and the disallowance should be restricted to 30% of total expenditure.

3. That the assessee craves to leave or add, alter, amend or withdraw any ground or ground(s) of appeal before or at the time of hearing.

3. Ground no. 1 raised by the assessee relates to disallowance of Rs. 4,68,092/- u/s 36(1)(v) on account of unapproved Gratuity Expenses.

4. Brief facts qua the issue are that on perusal of records furnished by the assessee, it was noticed by the assessing officer that the assessee made a contribution amounting to Rs.4,68,902/- to Group gratuity contribution scheme by the name of "Mrinalini Biri Mfg. Co.(P) Ltd. Employees' Gratuity Fund" which was claimed as an expense u/s.36(1)(v) of the Act. During the course of assessment proceedings, the assessee was asked to furnish the relevant documents. On perusal of the documents and submission made by the assessee, it was observed by the assessing officer that the payment made to the concerned gratuity fund was not yet approved by the Income Tax Department. As per the provisions of the Act, such a gratuity fund is to be approved by the Chief Commissioner or Commissioner of Income Tax, as per Rule 2(2) of Part C of the Fourth Schedule of the Act. Thus, AO was of the view that in the assessee`s case, the contribution is made to an unapproved Gratuity Fund, therefore deduction u/s 36(1)(v) of the Act cannot be claimed. Accordingly, deduction on account of contribution to Gratuity fund amounting to Rs.4,68,092/- claimed by the assessee was disallowed.

5. Aggrieved by the order of the Assessing Officer, the assessee carried the matter in appeal before the ld. CIT(A) who has confirmed the addition made by the Assessing Officer. Aggrieved by the order of the ld. CIT(A), the assessee is in appeal before us.

6. We have heard both the parties and carefully gone through the submission put forth on behalf of the assessee along with the documents furnished and the case laws relied upon, and perused the fact of the case including the findings of the ld CIT(A) and other materials available on record. The ld. Counsel for the assessee has relied on the submissions made before the authorities below and on the other hand the ld. DR has primarily reiterated the stand taken by the Assessing Officer which we have already noted in our earlier para and the same is not being repeated for the sake of brevity. We note that the issue raised by the assessee is whether contribution to group gratuity scheme made by the assessee to Life Insurance Corporation of India (LIC- Group Gratuity Scheme) is an allowable expenditure? It is as allowable expenditure as held by the Hon'ble Supreme Court in the case of Shri Sajjan Mills Ltd. vs. CIT reported in [1985] 23 Taxman 37 (SC), wherein it was held as follows:

> ***"16.*** *Our attention was drawn to the observations of this Court in the case of Metal Box Co. of India Ltd. v. Their Workmen [1969] 73 ITR 53 at pages 67 and 68 which were reiterated and referred to in the decision of this Court in Vazir Sultan Tobacco Co. Ltd.'s case (supra). In these appeals, we are not concerned with the distinction between 'provision' and 'reserves'. We are concerned with the true meaning and purport of the expression 'provision made by the assessee'. This Court in Vazir Sultan Tobacco Co. Ltd.'s case (supra) referring to the observations in the case of Metal Box Co. of India Ltd. (supra) .*
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> > *"The distinction between a provision and a reserve is in commercial accountancy fairly well known. Provisions made against anticipated losses and contingencies are charges against profits and, therefore, to be taken into account against gross receipts in the profit and loss account and the balance sheet. On the other hand, reserves are appropriations of profits, the assets by which they are represented being retained to form part of the capital employed in the business. Provisions are usually shown in the balance sheet by way of deductions from the assets in respect of which they are made whereas general reserves and reserve funds are shown as part of the proprietor's interest - see Spicer and Pegler's Book-keeping and Accounts, 15th Edn. p. 42." (p. 569)*
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> ***17.*** *It was emphasised that the concept of provision applied not only in respect of companies but also to individual assessees.*

18. *Reliance was also placed on the observations of this Court in Kedarnath Jute Mfg. Co. Ltd. v. CIT [1971] 82 ITR 363 where it was emphasised that whether an assessee was entitled to a particular deduction or not depended on the provision of law relating thereto and not on the view that the assessee might take of his rights; nor could the existence or absence of entries in the books of account be decisive or conclusive in the matter. The assessee who was maintaining accounts on the mercantile system was fully justified in claiming deduction of the amount of sales tax which it was, under the law, liable to pay during the relevant accounting year.*

19. *The counsel was emphatic that there was no obligation cast on any assessee either by any law or even by the canons of accounting practice to make any provision in the books of account in respect of the liability to pay gratuity. Consequently, an assessee might claim as deduction in his income-tax assessment the liability in respect of gratuity even though he might not have made any provision or other entry in his books of account in respect of gratuity.*

20. *It was the assessee's case that section 40A(7) was not a complete code in respect of gratuity. Section 40A contained only a series of specific and limited disallowances. If an item of expenditure was not covered by section 40A, it was not as if it could not be claimed as deduction at all. On the contrary, if section 40A did not apply, there was no bar at all to claiming the expenditure as deduction either under section 28 or under section 37 of the Act provided it was incurred wholly and exclusively for the purpose of business. It was further submitted that section 40A(7) could not possibly be considered to be a complete code with regard to the allowance of deduction for gratuity, inter alia, because section 40A(7) merely provided for disallowance if provision of gratuity was made by the assessee. It does not say that no deduction will be allowed in respect of gratuity unless and until certain conditions were fulfilled.*

21. *Section 40A is in Chapter IV of the Act which deals with computation of total income. It is under the sub-heading of a group of sections dealing with the computation of profits and gains of business or profession. The said group of sections begin with section 28 and go up to section 40D. Section 40A is with the marginal note under the heading 'Expenses or payments not deductible in certain circumstances'. If the marginal note or heading is any indication, and it certainly is a relevant factor to be taken into consideration in construing the ambit of the section, then these payments mentioned therein are not deductible according to the statute in certain circumstances. Therefore, the heading of this section is a clear indication that certain payments and expenses which would be otherwise deductible would not be deductible except in certain circumstances indicated in the section. This is abundantly made clear by the non obstante expression used in sub-section (1) of section 40A. As noted before, the provisions of section 40A shall have effect notwithstanding anything to the contrary contained in any other provision of the Act. Payments of deductions or provision for deduction could have been eligible for deduction or could have been deducted either under section 28 or under section 37. But the use of the non obstante expression makes it clear that if there is any legislative base dealing with the provisions for gratuity then the same would be applicable in spite of and notwithstanding any other provision of the Act. Read with the marginal notes of section 40A, the non obstante clause of sub-section (1) of section 40A has an overriding effect over the provisions of any other section by providing that the provisions of the section will have effect notwithstanding anything to the contrary contained in any other provision relating to the computation of income under the head 'Profits and gains of business or profession'. Expenditures or*

allowances which are deductible under any other provision relating to the head 'Profits and gains of business or profession' will be disallowed in cases to which these provisions of the section apply. Sub-section (7) of section 40A was inserted by the Finance Act, 1975 with retrospective effect from 1-4-1973. It is necessary to appreciate the purpose and object intended to be achieved by this sub-section in order to arrive at the true meaning of the provision.

22. *Payment of gratuity as commonly under stood is the payment made to the employee by the employer on his retirement or termination of his service for any reason. It is made voluntarily by the employer as a regular practice or pressure of trade or business either under an agreement with the employees or on the understanding of the trade and after the enactment of the Payment of Gratuity Act which came into force on 16-9-1972, as a statutory liability under the said Act. Although payment of gratuity is made on retirement or termination of service, it was not for the service rendered during the year in which the payment is made but it is made in consideration of the entire length of service and its ascertainment and computation depend upon several factors.*

23. *The right to receive the payment accrued to the employees on their retirement or termination of their services and the liability to pay gratuity became the accrued liability of the assessee when the employees retired or their services were terminated. Until then the right to receive gratuity is a contingent right and the liability to pay gratuity continues to be a contingent liability qua the employer. An employer might pay gratuity when the employee retires or his service is terminated and claim the payment made as an expenditure incurred for the purpose of business under section 37. He might, if he followed the mercantile system, provide for the payment of gratuity which became payable during the previous year and claim it as an expenditure on the accrued basis under section 37. Since the amount of gratuity payable in any given year would be a variable amount depending upon the number of employees who would be entitled to receive the payment during the year, the amount being a large one in one year and a small one in another year, the employer often finds it desirable and/ or convenient to set apart for future use a sum every year to meet the contingent liability as a provision for gratuity or a fund for gratuity. He might create an approved gratuity fund for the exclusive benefit of his employees under an irrevocable trust and make contributions to such fund every year. Contingent liabilities do not constitute expenditure and cannot be the subject-matter of deduction even under the mercantile system of accounting. Expenditure which was deductible for income-tax purposes is towards a liability actually existing at the time but setting apart money which might become expenditure on the happening of an event is not expenditure. See in this connection the observations of this Court in Indian Molasses Co. (P.) Ltd. v. CIT [1959] 37 ITR 66 at pages 76 and 78. A distinction is often made between an actual liability in praesenti and a liability de futuro, which for the time being is only contingent. The former is deductible but not the latter.*

24. *Amount set apart by way of provision or by way of a reserve or fund to meet the liability of gratuity as and when it becomes payable will not be deductible allowance or expenditure. Where, however, an approved gratuity fund is created for the exclusive benefit of the employees under an irrevocable trust, contribution made to the fund during the year of account will be allowed to be deducted under section 36(1)(v).*

25. *In Metal Box Co. of India Ltd.'s case (supra) this Court held that contingent liabilities discounted and valued as necessary could be taken into account as trading expenses if these were sufficiently certain to be capable of being valued. An estimated liability under a gratuity scheme even if it amounted to a contingent liability if properly ascertainable and its present value was fairly discounted was deductible from the gross profits while preparing the profit and loss account. In view of this decision and other decisions that followed it, it became permissible for an assessee if he so chose to provide in his profits and loss account for the estimated liability under a gratuity scheme by ascertaining its present value on accrued basis and claiming it as an ascertained liability to be deducted in the computation of the profits and gains of the previous year.*

26. *It would, thus, be apparent from the analysis aforesaid that the position till the provisions of section 40A(7) were inserted in the Act in 1973 was as follows:*

> *"(1) Payments of gratuity actually made to the employee on his retirement or termination of his services were expenditure incurred for the purpose of business in the year in which the payments were made and allowed under section 37.*
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> *(2) Provision made for payment of gratuity which would become due and payable in the previous year was allowed as an expenditure of the previous year on accrued basis when mercantile system was followed by the assessee.*
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> *(3) Provision made by setting aside an advance sum every year to meet the contingent liability and gratuity as and when it accrued by way of provision for gratuity or by way of reserve or fund for gratuity was not allowed as an expenditure of the year in which such sum was set apart.*
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> *(4) Contribution made to an approved gratuity fund in the previous year was allowed as deduction under section 36(1)(v).*
>
> *(5) Provision made in the profit and loss account for the estimated present value of the contingent liability properly ascertained and discounted on an accrued basis as falling on the assessee in the year of account could be deductible either under section 28 or section 37."*

27. *As there were several methods which the assessee might choose to adopt in meeting his liability to pay gratuity, the treatment which he would receive under the Act would depend upon the method adopted by him. The assessee is only under an obligation to pay gratuity when it became due and payable. The other methods adopted by the assessee for meeting the liability for gratuity as and when it arose are provisions or arrangements made by him at his option. It is not obligatory on him to make any such provision and if no such arrangement or provision was made, no question arose to consider its deductibility or allowance under the Act.*

28. *The intention of the Legislature in enacting the provision of section 40A(7) would be apparent from the notes on clauses of the amendment where in paragraph No. 46, after referring to the provisions of section 37(1) and section 36(1)(v), it was observed inter alia, as follows:*

> *"... A reading of these two provisions clearly shows that the intention has always been that deduction in respect of gratuities should be allowed either in the year in which the gratuity is actually paid or in the year in which contributions are made to an approved gratuity fund. A doubt has been*

expressed that the relevant provisions, as presently worded, do not secure the underlying objective and that a provision made by a taxpayer in his accounts in respect of estimated service gratuity payable to employees will be deductible in computing the taxable income in a case where the provision has been made on a scientific basis in the form of an actuarial valuation. In order to remove uncertainty in the matter, it is proposed to specifically provide in the law that no deduction will be allowed, in the computation of profits and gains of a business or profession, in respect of any reserve created or provision made for the payment of gratuity to the employees on retirement or on termination of employment for any reason. This restriction will, however, not apply in relation to a provision made for the purpose of payment of a sum by way of contribution towards an approved gratuity fund that has become payable during the relevant account year, or for the purpose of meeting actual liability in respect of payment of gratuity to the employees that has arisen during such year." - [1975] 98 ITR (St.) 194

29. *This intention and the purpose of the Legislature was carried into effect by inserting sub-section (7) in section 40A by ensuring the overriding effect over the other provisions of the Act. Therefore, in interpreting or in trying to find out the meaning of that provision, one should, if possible and in this case it is not at all straining give effect to that intention and not to make a nonsense of that intention. Clause (a)of the said sub-section provides that no deduction will be allowed in respect of any provision (whether called as such or by any other name) made by the assessee for the payment of gratuity to his employees on their retirement or termination of their services for any reason. The expression 'provision' has not been defined in the Act and is not used in any artificial sense but in its ordinary meaning. This is clear from the words (whether called as such or by any other name) occurring in sub-section. According to Webster, 'provision' in its ordinary sense means 'something provided for future use'.*

30. *On a plain construction of clause (a)of sub-section (7) of section 40A, what it means is that whatever is provided for future use by the assessee out of the gross profits of the year of account for payment of gratuity to employees on their retirement or on the termination of their services would not be allowed as deduction in the computation of profits and gains of the year of account. The provision of clause (a)was made subject to clause (b) . The embargo is on deductions of amounts provided for future use in the year of account for meeting the ultimate liability to payment of gratuity. Clause (b)(i)excludes from the operation of clause (a)contribution to an approved gratuity fund and amount provided for or set apart for payment of gratuity which would be payable during the year of account. Clause (b)(ii)deals with a situation that the assessee might provide by the spread-over method and provides that such provision would be excluded from the operation of clause (a) provided the three conditions laid down by the sub-clauses are satisfied.*

31. *The submission of the assessee is that if no provision is made by the assessee for gratuity, still the same will be deductible and section 40A(7) will have no application, would defeat the very purpose and object of section 40A(7) and render it nugatory. The interpretation as suggested by the assessee would entitle the assessee who made no provision to claim deduction whereas an assessee who made a provision would not get deduction unless the requirements laid down in the sub-section are fulfilled. This interpretation, if accepted, will lead to a curious result, and if one may venture to say an absurd result, and even where the assessee has not chosen to adopt the spread-over method and has not provided for the present value*

of the contingent liability attributable to the year of account by charging it on the profits of the year, the assessee would still be entitled to claim as deduction from the gross profits of the year the said estimated liability which he could have provided for but he has not chosen to do so.

32. *Where the intention of the Legislature in enacting the provision in question was to put an embargo on the deduction, the interpretation suggested by the assessee defeats that purpose.*

33. *Kedarnath Jute Mfg. Co. Ltd.'s case (supra) referred to hereinbefore dealt with a different situation. The accrual of sales tax liability in that case did not depend on the option of the assessee to make or not to make it for the year. The case of the Bombay High Court in Tata Iron & Steel Co. Ltd. v. D.V. Bapat, ITO [1975] 101 ITR 292 was a case on which reliance was placed on behalf of the assessee where provision was made but was a case before the enactment of section 40A (7) arising out of the assessment year 1972-73. Similarly CIT v .High Land Produce Co. Ltd. [1976] 102 ITR 803 (Ker.) another decision relied on by the assessee, was where a provision was made. It arose out of the assessment year 1970-71 before the enactment of section 40A(7). These are the cases upon which the assessee had relied. Another case upon which the assessee relied was Swadeshi Cotton Mills Co. Ltd. v. ITO [1978] 112 ITR 1038 (All.). This case arose out of the assessment year 1973-74 to which the provision of section 40A(7) was applicable. The Allahabad High Court, however, took the view that bar created by the said provision did not apply since the conditions laid down had to be fulfilled in future. It did not take into consideration the provision of section 155(13) of the Act. The Madras High Court in C1T v. Andhra Prabha (P.) Ltd. [1980] 123 ITR 760 has doubted the decision of the Allahabad High Court in Swadeshi Cotton Mills Co. Ltd.'s case (supra) and further observed that the question of deductibility of a claim for gratuity liability could not be allowed on general principles under any provisions of the Act.*

34. *The aforesaid difficulties in accepting the contentions urged on behalf of the assessee were highlighted by the Calcutta High Court in the case of Peoples Engg. & Motor Works Ltd. (supra) . It was pointed out that the payment of gratuity was a statutory liability created under the Payment of Gratuity Act. It could normally be said to have arisen for the carrying on of business. However, for gratuity to be deductible under the Act, must fulfil the conditions laid down in section 40A(7). The deduction could not be allowed on general principles under any other section of the Act because sub-section (1) of section 40A makes it clear that the provisions of the section shall have effect notwithstanding anything to the contrary contained in any other provision of the Act relating to the computation of income under the head 'Profits and gains of business or profession' or in other words it means that section 40A would have effect notwithstanding anything contained in sections 30 to 39 of the Act.*

35. *This position was again reiterated by the Calcutta High Court in the case of CIT v. New Swadeshi Mills of Ahmedabad Ltd. [1984] 147 ITR 163 where it was explained at page 172 of the report that prohibition in section 40A(7) was on deduction in respect of any provision (whether called as such or by any other name) made by the assessee for the payment of gratuity. The amplitude of the section was indicated by the use of the expression 'whether called as such or by any other name'. It was further reiterated that the interpretation suggested on behalf of the assessee would lead to a conclusion which would be extraordinary and repugnant to*

commonsense. It will also cause grave injustice to the assessee who have been prudent enough to set apart a sum for payment of gratuity.

***36.** The principle that fiscal statutes should be strictly construed does not rule out the application of the principles of reasonable construction to give effect to the purpose or intention of any particular provision as apparent from the scheme of the Act, with the assistance of such external aids as are permissible under the law.*

***37.** For the aforesaid reasons, it is not possible to accept the assessee's contentions. The questions referred to the High Court were, therefore, rightly answered in the negative by the High Court. The appeals, accordingly, fail and are dismissed with costs."*

7. Our view is fortified, by the judgment of Hon'ble High Court of Karnataka, on the identical facts, in the case of Chief Commissioner vs. Karnataka Electricity Board reported in [1993] 69 Taxman 318 (Karnataka) wherein it was held as follows:

***"10.** The main question is not free from doubt substantial reasoning can be found in support of the rival propositions. In such a situation, a practical approach is to accept the view which is favourable to the assessee, as against the stand of the revenue. Unless strong reasons exist, normally the earlier decision of a Division Bench should be followed by the subsequent Bench. The latter Bench, if it disagrees with the earlier view, can only refer the question to a larger Bench. But, this is done only in rare cases where public interest requires reconsideration of the earlier view if the earlier view is patently erroneous.*

***11.** Apart from the decision of this Court in Karnataka State Warehousing Corpn.'s case (supra), the decisions of the Calcutta and Gujarat High Courts also support the assessee's case. CIT v. Eastern Spg. Mills Ltd. [1980] 126 ITR 686 is the decision of the Calcutta High Court. In pursuance of a statutory requirement under the West Bengal Employees' Payment of Compulsory Gratuity Act, 1971, a special liability was incurred by the assessee and the provision made to meet this liability was claimed as a deduction under section 37. A reasonable amount was allowed as a deduction by the ITO. The High Court held that a prudent estimate of the liability was entitled to deduction under section 37; the contention that gratuity is a subject covered by section 36(1) and, hence, deduction could be claimed only on satisfying its provisions was not accepted. The Bench held:*

". . . The fact that under clause (v) of sub-section (1) of section 36 of the Act the sum paid by the assessee by way of contribution towards an approved gratuity fund for the exclusive benefit of the employee is deductible does not, in our opinion, affect the position. The assessee claimed its right to deduct this sum because this amount was a special liability which, we have noticed before, was created for the first time in 1971. . . ."(p. 704)

***12.** In CIT v. Chhotabhai Jethabhai Patel Tobacco Products Co. Ltd. [1981] 128 ITR 702, the Gujarat High Court also expressed a similar view with regard to the contributions made to a non-recognised provident fund. The payments to the fund were held to have been made on the ground of commercial expediency and, hence,*

deductible under section 37. After referring to a few decisions and the principle applicable to the case, the High Court held:

> *". . . It is obvious that in the instant case, when contribution was made by the assessee-company for the provident fund amount of the employees even when there was no recognised fund in existence, it would be justifiable on the ground of commercial expediency, so as to keep their workers satisfied and to see to it that the workers get the benefit of provident fund, and thus this was a payment made for the purpose of earning the profits of the business by the assessee or in the course of earning profits of the business by the assessee. . . ." (p. 707)*

13. *In the instant case, the provision made by the assessee is to meet its statutory obligation, since this statutory corporation is obliged to pay pension to its employees under the rules governing it; there is no dispute about this fact. The concept of commercial expediency is not foreign to a statutory corporation like the instant assessee which is obliged to carry on a venture which any other commercial enterprise also can carry on.*

14. *In these circumstances, we are of the opinion that there are no compelling reasons for us to differ from the earlier view stated in Karnataka State Warehousing Corpn.'s case (supra) and, accordingly, we accept the same.*

15. *The second question referred is answered in the affirmative and against the revenue."*

8. Thus, we note that the payment made by the assessee to the Life Insurance Corporation under Group Gratuity Scheme would be an allowable expenditure as held by the Hon'ble Supreme Court in the case of Shri Sajjan Mills (supra) therefore respectfully following the judgment of Hon'ble Supreme Court in the case of Sajjan Mills (supra), we allow ground no.1 raised by the assessee.

9. Ground no. 2 raised by the assessee relates to disallowance of Rs. 16,22,702/- u/s 40(a)(ia) of the Act on account of non-deduction of TDS.

10. Brief facts qua the issue are that on perusal of records furnished by the assessee during the course of assessment proceedings it was noticed by the assessing officer that the assessee has made payments to the tune of Rs. 17,47,505/- on account of Label Printing to three different parties. However, no TDS has been made on the same. During the Assessment proceedings, the assessee had been asked to explain why this amount of Rs. 17,47,505/- should not be disallowed for non-deduction of TDS u/s 40(a)(ia) of the Act. However, since the

assessee during the assessment proceedings could not offer any satisfactory explanation in this regard, therefore the entire expense amounting to Rs. 17,47,505/- incurred towards Label Printing was disallowed by the assessing officer.

11. Aggrieved by the order of the Assessing Officer, the assessee carried the matter in appeal before the ld. CIT(A) who has confirmed the order passed by the assessing officer. Aggrieved by the order of the ld. CIT(A) the assessee is in appeal before us.

12. We have heard both the parties and carefully gone through the submission put forth on behalf of the assessee along with the documents furnished and the case laws relied upon, and perused the fact of the case including the findings of the ld CIT(A) and other materials available on record. The ld. Counsel for the assessee has relied on the submissions made before the authorities below and on the other hand the ld. DR has primarily reiterated the stand taken by the Assessing Officer which we have already noted in our earlier para and the same is not being repeated for the sake of brevity.

We note that the short question before us raised by the assessee is that the disallowance should be restricted to 30% of the total disallowance i.e. Rs. 4,86,811/- (30% of Rs. 16,22,702/- as per amended provision of Income Tax Act). The amendment made by Finance Act, 2014 is curative in nature and should have retrospective effect. Therefore, the important aspect to be examined is that whether insertion of second proviso to Sec. 40(a)(ia) is retrospective or prospective in nature. We note that the said issue raised by the assessee is no longer *res integra,* recently the Hon`ble Supreme Court in the case of Shree Choudhary Transport Company Vs. Income Tax Officer CIVIL APPEAL No. 7865 OF 2009, dated 29th July, 2020 held that amendment in the second proviso to Sec. 40(a)(ia) is prospective in nature. The important findings of the Hon`ble Supreme Court is given below:

"20. Before finally answering the root question in the matter as to whether the payments in question have rightly been disallowed from deduction, we may usefully summarise the answers to Question Nos. 1 to 3 that the provisions of Section 194C were indeed applicable and the assessee-appellant was under obligation to deduct the tax at source in relation to the payments made by it for hiring the vehicles for the purpose of its business of transportation of goods; that disallowance under Section 40(a)(ia) of the Act is not limited only to the amount outstanding and this provision equally applies in relation to the expenses that had already been incurred and paid by the assessee; that disallowance under Section 40(a)(ia) of the Act of 1961 as introduced by the Finance (No.2) Act, 2004 with effect from 01.04.2005 is applicable to the case at hand relating to the assessment year 2005-2006; and that the benefit of amendment made in the year 2014 to the provision in question is not available to the appellant in the present case. These answers practically conclude the matter but we have formulated Question No. 4 essentially to deal with the last limb of submissions regarding the prejudice likely to be suffered by the appellant.

21. The suggestion on behalf of the appellant about the likely prejudice because of disallowance deserves to be rejected for three major reasons. In the first place, it is clear from the provisions dealing with disallowance of deductions in part D of Chapter IV of the Act, particularly those contained in Sections 40(a)(ia) and 40A(3)of the Act, that the said provisions are intended to enforce due compliance of the requirement of other provisions of the Act and to ensure proper collection of tax as also transparency in dealings of the parties. The necessity of disallowance comes into operation only when default of the nature specified in the provisions takes place. Looking to the object of these provisions, the suggestions about prejudice or hardship carry no meaning at all. Secondly, as noticed, by way of the proviso as originally inserted and its amendments in the years 2008 and 2010, requisite relief to a bonafide tax payer who had collected TDS but could not deposit within time before submission of the return was also provided; and as regards the amendment of 2010, this Court ruled it to be retrospective in operation. The proviso so amended, obviously, safeguarded the interest of a bonafide assessee who had made the deduction as required and had paid the same to the revenue. The appellant having failed to avail the benefit of such relaxation too, cannot now raise a grievance of alleged hardship. Thirdly, as noticed, the appellant had shown total payments in Truck Freight Account at Rs. 1,37,71,206/- and total receipts from the company at Rs. 1,43,90,632/-. What has been disallowed is that amount of Rs. 57,11,625/- on which the appellant failed to deduct the tax at source and not the entire amount received from the company or paid to the truck operators/owners. Viewed from any angle, we do not find any case of prejudice or legal grievance with the appellant.

21.1. Hence, answer to Question No. 4 is clearly in the affirmative i.e., against the appellant and in favour of the revenue that the payments in question have rightly been disallowed from deduction while computing the total income of the assessee-appellant.

Conclusion

22. For what has been discussed hereinabove, this appeal fails and is, therefore, dismissed with costs."

Hence the amendment in the second proviso to Sec. 40(a)(ia) is prospective in nature therefore, disallowance should not be restricted to 30% of the total disallowance i.e. Rs. 4,86,811/- (30% of Rs. 16,22,702/-),therefore we dismiss the ground raised by the assessee.

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

Order pronounced in the Court on 16.09.2020

Sd/-	**Sd/-**
(A.T. VARKEY)	**(A.L.SAINI)**
न्यायिकसदस्य / JUDICIAL MEMBER	**लेखासदस्य / ACCOUNTANT MEMBER**

कोलकाता /Kolkata;
दिनांक/ Date: 16/09/2020
(*SB, Sr.PS*)

Copy of the order forwarded to:
1. M/s Mrinalini Biri Manufacturing Co
2. DCIT, Circle-8(1), Kolkata
3. C.I.T(A)-
4. C.I.T.- Kolkata.
5. CIT(DR), KolkataBenches, Kolkata.
6. Guard File.

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By Order

Assistant Registrar
ITAT, Kolkata Benches