ASSISTANT COMMISSIONER OF INCOME TAX vs.A&A EARTHMOVERS PVT. LTD.

DELHI TRIBUNAL

N.K. SAINI, AM & CHANDRA MOHAN GARG, JM.

ITA No. 2098/Del/2013 (C.O. No. 177/Del/2013)

Jul 29, 2015

715Taxpundit 90

Legislation Referred to

Section 2(22)(e), 40A, 139(1)

Case pertains to

Asst. Year 2009-10

Decision in favour of:

Assessee

Counsel appeared:

K.K. Jaiswal, DR for the Appellant.: Dr. Rakesh Gupta, Somil Agarwal, Advocates for the Respondent

CHANDRAMOHAN GARG, JM.

1. The appeal of the revenue as well as Cross Objection of the assessee have been filed against the order of CIT(A)-IV, New Delhi dated 21.1.2013 passed in Appeal No. 299/11-12 for AY 2009-10.

ITA No. 2098/Del/2013 of the revenue

2. The revenue has raised sole ground in this appeal which reads as under:-

"1. Whether the ld. CIT(A) has erred in law and on facts in deleting the addition of Rs.42,97,686/- made u/s 2(22)(e) as deemed dividend ignoring the fact that company is not engaged in the ordinary course of money lending and finance."

3. We have heard arguments of both the sides and carefully perused the relevant material placed on record. Ld. Counsel for the assessee, at the very outset, pointed out that the issue is squarely covered in favour of the assessee by the order of the Hon'ble Jurisdictional High Court of Delhi in the case of CIT vs Ankitech Pvt. Ltd. (2012) 340 ITR 14 (Del) and also submitted that for the purpose of section 2(22)(e) of the Income Tax Act, 1961, the amount received by the assessee as advances and loans would be treated as dividend within the meaning of said provisions of the Act and advances to the assessee company from another company wherein persons having substantial interest in the assessee company and

another company which gave the loan having substantial interest, then also if the assessee recipient company of loan is not shareholder of company of other company which gave the loan, then the amount of loan is not assessable as deemed dividend u/s 2(22)(e) of the Act.

4. Ld. DR supporting the action of the AO submitted that the AO was right in making addition and in holding that the deemed dividend of Rs.42,97,686 (to the extent of accumulated profit) is to be treated as deemed income u/s 2(22)(e) of the Act in the hands of the assessee from the loan taken from M/s R.D. Finlease Pvt. Ltd. Ld. DR vehemently contended that the CIT(A) was not justified and correct in deleting the said addition, therefore, impugned order may be set aside by restoring that of the AO. Ld. Counsel of the assessee replied that since the assessee company is not a shareholder of M/s R.D. Finlease Pvt. Ltd., therefore, the provisions of section 2(22)(e) cannot be invoked and addition in this regard was rightly found as not sustainable by the CIT(A). The ld. Counsel of the assessee took us through the operative part of the impugned order and submitted that the CIT(A) was right in holding that the impugned addition in the hands of the assessee company cannot be sustained as the amount can be brought to tax only in the hands of the shareholder of the lender company i.e. Shri Ashish Anand and not in the hands of appellant company which is not a registered shareholder of the lender company.

5. On careful consideration of above submissions, from operative part of the impugned order, we note that the CIT(A) granted relief for the assessee with following observations and conclusion:-

"7.4 Further, I find that in arriving at the above decision, the Hon'ble ITAT has relied on the decision of Hon'ble Rajasthan High Court in the case of CIT v. Hotel Hill Top (2009) 313 ITR 116 wherein it was held that deemed dividend cannot be brought to tax in the hands of a non-shareholder. It was held by the Hon'ble High Court that "The liability of tax, as deemed dividend, could be attracted in the hands of the individuals, being the shareholders, and not in the hands of the firm." Further, the apex court in the case of C. P. Sarathy Mudaliar considering the provisions of section 2(6A)(e) of the I. T. Act, 1922, which was synonymous to section 2(22)(e) of the current Act, held that shareholder in the context of deemed dividend referred to only registered shareholder. The above view was also confirmed by the apex court in the case of Rameshwarlal Sanwarmal v. CIT 1980) 122 ITR 1.

7.5. Respectfully following the ratio of the above judgments on the issue, the addition of Rs.42,97,686/- in the hands of the appellant company cannot be sustained as the amount can be brought to tax only in the hands of the shareholder of the lender company, i.e. Shri Ashish Anand and not in hands of the appellant company which is not a registered shareholder of the lender company. In view of the above discussion, the aforesaid addition in the hands of the appellant company stands deleted. The AO is directed to inform the AO of Shri Ashish Anand to take necessary action in his hands as per law. Ground No. 4 of the appeal is allowed in the manner indicated above."

6. In view of above conclusion of the first appellate authority and on careful consideration of the facts and circumstances of the present case in hand, we note that in the case of CIT vs Ankitech Pvt. Ltd. (supra), after considering the ratio of the relevant decisions and judgments, it was held that if the amounts advanced are for business transaction between the parties, such payments would not fall within the deeming provisions of section 2(22)(e) of the Act. Ld. Counsel further submitted that in the

said judgement, Hon'ble Delhi High Court also held that even the money which was paid was not in the nature of loan or advance simplicitor, but the amounts were advanced for business transaction. In this situation, even the shareholder cannot be fastened with any tax liability as conditions stipulated under Section 2(22)(e) of the Act would not be treated as satisfied.

7. On careful consideration of above submissions, we are of the view that as per provisions of section 2(22)(e) of the Act, the liability of tax can be fastened only on the shareholder of the payer company. In the present case, the AO could not bring out any fact to support that the loan taken by the assessee company from M/s R.D. Finlease Pvt. Ltd. satisfies the requirement of section 2(22)(e) of the Act as the assessee company is not a shareholder of M/s R.D. Finlease Pvt. Ltd. In the light of above legal proposition and dicta laid down by the Jurisdictional High Court of Delhi in the case of CIT vs Ankitech Pvt. Ltd., we are of the opinion that the action taken by the AO was not in accordance with law and letter and spirit of section 2(22)(e) of the Act which was rightly directed to be deleted by the CIT(A) by passing the impugned order. Hence we reach to a logical conclusion that the view taken by the CIT(A) does not carry any infirmity or perversity and we are unable to see any val d reason to interfere with the same. Accordingly, sole ground of the revenue being devoid of merits is ismissed.

C.O. No. 177/Del/2013 of the assessee

8. Firstly, ld. Counsel of the assessee submitted that the assessee does not want to press ground no. 2 and the same is dismissed as not pressed. CO No. 3 and 4 are general in nature which need no adjudication on merits and we dismiss the same The sole ground of C.O. No. 1 of the assessee reads as under:-

"That having regard to the facts and circumstances of the case, ld. CIT(A) has erred in law and on facts in not deleting the disallowance of Rs 54,51,000/- fully as made by ld. AO u/s 40(a)(ia) and further erred in sustaining the same to the extent of Rs.16,32,925/- and that too without considering the submission of the assessee."

9. We have heard arguments of both the sides and carefully perused the relevant material placed on record. Ld. Counsel of the assessee submitted a copy of the order of ITAT Agra Bench in the case of Shri Rajeev Kumar Agrawal vs JCIT dated 29.5.2014 in ITA No. 338/Agra/2013 for AY 2007-08 and submitted that the insertion of second proviso to section 40(1)(ia) is declaratory and curative in nature and hence it has retrospective effect from 1.4.2005 being the date from which sub-clause (ia) of section 40A was inserted by Finance No.(2) Act 2004. Ld. Counsel further pointed out that the issue may be sent to the AO with a direction that the AO shall give due and fair opportunity of hearing to the asssessee and decide the matter afresh in accordance with law by way of speaking order considering this fact that second proviso to section 40(a)(ia) of the Act is declaratory and curative having retrospective effect from 1.4.2005. Ld. DR replied that the action of the AO was quite justified which was rightly upheld by the CIT(A) and CO of the assessee having no force deserves to be dismissed.

10. Ld. DR also pointed out that subsequent amendment is not applicable retrospectively to the earlier years and the ld. DR objected to remand of issue to the AO.

11. On careful consideration of above submissions and perusal of the material placed on record, we observe that the AO made disallowance u/s 40(a)(ia) of the Act by observing that on perusal of Form 3CD it was seen that the auditors had reported that there was tax deductible at source which was not deducted at all of Rs.3,70,021/-. The AO also observed that in Form 3CD tax of Rs.1,75,119 has been deducted but not credited in the Government account. Hence, assuming that the rate of TDS is 10% on both the amounts, the AO made disallowance of Rs.545100/-. On appeal by the assessee, first appellate authority granted relief to the extent of Rs.38,18,475/- but confirmed the addition to the extent of Rs.16,32,925 with following observations and conclusion:-

"5.5.1 Regarding the balance amount of Rs. 37,00,210/-, it was submitted that the same was calculated by the AO on the reasoning that TDS was Rs. 3,70,021/- which was deducted @ 10% and therefore, the interest payable must have been Rs. 37,00,210/-. However, the tax deductible was @ 22.66% on the interest payment of Rs. 16,32,925/- amounting to Rs. 3,70,021/-. It was submitted that the said interest income of Rs. 16,32,925/- had been accounted by JCB (India) Ltd. in its return of income for the AY 2009-10. The appellant produced a copy of certificate to this effect issued by JCB (India) Ltd. It was submitted that the AO did not appreciate the true position by assuming that the interest amount on this account would have been Rs. 37,00,210/- @ 10% on account of tax deductible at source of Rs. 3,70,021/- and was liable to be added back to the income of the appellant. I find force in the submissions of the appellant that the correct rate of TDS applicable on the int rest payment was 22.66% and not 10% as applied by the AO. Therefore, the amount of interest payment on which TDS of Rs.3,70,021/- was required to be made comes to Rs. 16,32,925/-. However I do not agree with the submissions of ld. AR that since the said interest income of Rs.16,32,925/- had been accounted for by the JCB (India) Ltd. in the income tax return for the AY 2009-10 and therefore no addition was required to be made. Section 40(a)(ia) of the Act provides that where interest was deductible and the same has not been deducted, the amount is to be disallowed u/s 40(a)(ia). It is not material whether the person to whom TDS has been paid accounted it in its books of accounts or not. The case laws relied upon by the ld. AR are of no help to the appellant as they were decided on different facts and hence are distinguished. On the contrary, Special Bench of ITAT Vi akhapatnam in the case of Merilyn Shipping & Transports v. Addl. CIT (2012) 136 ITD 0023S has held that disallowance u/s 40(a)(ia) is justified if TDS has not been made by the assessee irrespective of the fact that the tax was paid on such income by payee. The Hon'ble Special, Bench has referred to the decision of Hon'ble Allahabad High Court in the case of Dey's Medical (U.P.) (P) Ltd. vs, UOI in Civil Misc. W.P. No. 186 (Tax) of 2008 dated 15.02.2008 and held that in a situation in which tax has been paid on income by payee but no TDS was made by the payer, disallowance u/s 40(a)(ia) will be still attracted and this may be a case of casus omisus but the Court cannot fill this gap. The Hon'ble Special Bench also relied on the decision of Hon'ble Madras High Court in the case of Tube Investments of India Ltd. vs. ACIT (2010) 395 ITR 610 in which Hon'ble Madras High Court in para 61 of the judgment held that whole of expenditure claimed without making TDS is to be disallowed. Therefore, the addition of Rs. 16,32,925/- is confirmed. Thus, the appellant gets a relief of Rs. 38,18,475/- (Rs. 54,51,400/- - 16,32,925/-). The ground of appeal is partly allowed."

12. Now, we consider the ratio of the order of ITAT Agra dated 29.5.2014 (supra) wherein the Tribunal held as under:-

“4. Vide our order of even date we have upheld the grievance of the assessee and observed as follows:-

2. The issue in appeal lies in a rather narrow compass of undisputed material facts. During the course of the scrutiny assessment proceedings, the Assessing Officer noticed that the assessee has made interest payments, aggregating to Rs 5,01,872, without discharging his tax withholding obligations under section 194A. It was in this backdrop that the Assessing Officer, having noted the undisputed position regarding applicability of section 194 A on the facts of this case, and having noted that the scope of section 40(a)(ia) restricting deduction in respect of sums in respect of which tax withholding liability is not discharged, disallowed Rs 5,01,872 under section 40(a)(ia) r.w.s. 194A of the Act. Aggrieved, assessee carried the matter in appeal before the CIT(A). It was, inter alia, contended by the assessee that in view of the insertion of second proviso to Section 40(a)(ia) by the Finance Act 2012, and in view of the fact that the recipients of the interest have already included the income embedded in these payments in their tax returns filed under section 139, disallowance under section 40(a)(ia) could not be invoked in this case. It was also contended that even though this proviso is stated to be effective 1st April 2013, since the amendment in "declaratory and curative in nature, and, therefore, it 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". None of these submi sions, however, impressed the learned CIT(A). Relying upon a Special Bench decision in the case of Bharati Shipyard Ltd Vs. DCIT (141 TTJ 129), has rejected this plea and concluded that insertion of second proviso to Section 40(a)(ia) cannot be held to have retrospective effect. The disallowance was thus confirmed by the learned CIT(A). The assessee is aggrieved and is in appeal before us.

3. We have heard the rival contentions, perused the material on record and duly considered factual matrix of the case as also the applicable legal position.

4. Let us first take a look at the legislative amendment of section 40(a)(ia), vide Finance Act 2012, and try to appreciate the scheme of things as evident in the amended section. Second proviso to Section 40(a)(ia), introduced with effect rom 1st April 2013, provides, 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". In other words, as long as the assessee cannot be treated as an assessee in default, the disallowance under section 40(a)(ia) cannot come into play either. To understand the effect of this proviso, it is useful to refer to first proviso to section 201(1), which is also introduced by the Finance Act 2012 and effective 1st July 2012, and which provides 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." The unambiguous underlying principle seems to be that in the situations in which the assessee's tax

withholding lapse have not resulted in any loss to the exchequer, and this fact can be reasonably demonstrated, the assessee cannot be treated as an assessee in default. The net effect of these amendments is that the disallowance under section 40(a)(ia) shall not be attracted in the situations in which even if the assessee has not deducted tax at source from the related payments for expenditure but the recipient of the monies has taken into account these receipts in computation of his income, paid due taxes, if any, on the income so computed and has filed his income tax return under section 139(1). There is also a procedural requirement of issuance of a certificate, in the prescribed format, evidencing compliance of these conditions by the recipients of income, but that is essentially a procedural aspect of the matter. The legislative amendment so brought about by the Finance Act, 2012, so far as the scheme of disallowance under section 40(a)(ia) is concerned, substantially mitigates the rigour of, what otherwise seemed to be, a rather harsh disallowance provision.

5. As for the question as to whether this amendment can be treated as retrospective in nature, even in the case of Bharti Shipyard (supra) - a special bench decision vehemently relie upon in support of revenue's case, the special bench, on principles, summed up the settled legal position to the effect that "any amendment of the substantive provision which is aimed at . (nter alia) removing unintended consequences to make the provisions workable has to be treated as r trospective notwithstanding the fact that the amendment has been given effect prospectively". It was held that if the consequences sought to be remedied by the subsequent A.Y. 2007-08 amendments were to be treated as "intended consequences", the amendment could not be treated as retrospective in effect. The special bench the n proceeded to draw a line of demarcation between intended consequences and unintended consequences, and finally the retrospectivity of first p oviso was decided against the assessee on the ground that this special bench was of the considered view that "the objective sought to be achieved by bringing out section 40(a)(ia) is the augmentation of TDS provisions" and went on to add that "If, in attaining this main objective of augmentation of such provisions, the assessee suffers disallowance of any amount in the year of defaul , which is otherwise deductible, the legislature allowed it to continue". It was further observed that

"this is the cost which parliament has awarded to those assessees who fail to comply with the relevant provisions by considering overall objective of boosting TDS compliance"(Emphasis by underlining supplied by us). In other words, the amendment was held to be prospective because, in the wisdom of the special bench, the 2010 amendment to Section 40(a)(ia) by inserting first proviso thereto, which is what the special bench was dealing with, was an "intended consequence" of the provision of Section 40(a)(ia).

6. However, the stand so taken by the special bench was disapproved by Hon'ble Delhi High Court in the case of CIT Vs Rajinder Kumar (362 ITR 241). While doing so, Their Lordships observed that, "The object of introduction of Section 40(a)(ia) is to ensure that TDS provisions are scrupulously implemented without default in order to augment recoveries.....Failure to deduct TDS or deposit TDS results in loss of revenue and may deprive the Government of the tax due and payable " (Emphasis by underlining supplied by us)". Having noted the underlying objectives, Their Lordships also put in a word of caution by observing that, "the provision should be interpreted in a fair, just and equitable manner". Their Lordships thus recognized the bigger picture of realization of legitimate tax dues, as object of Section

40(a)(ia), and the need of its fair, just and equitable interpretation. This approach is qualitatively different from perceiving the object of Section 40(a)(ia) as awarding of costs on the "assessees who fail to comply with the relevant provisions by considering overall objective of boosting TDS compliance". Not only the conclusions arrived at by the special bench were disapproved but the very fundamental assumption underlying its approach, i.e. on the issue of the object of Section 40(a)(ia), was rejected too. In any event, even going by Bharti Shipyard decision (supra), what we have to really examine is whether 2012 amendment, inserting second proviso to Section 40(a)(ia), deals with an "intended consequence" or with an "unintended consequence".

7. When we look at the overall scheme of the section as it exists now and the bigger picture as it emerges after insertion of second proviso to section 40(a)(ia), it is beyond doubt that the underlying objective of section 40(a)(ia) was to disallow deduction in respect of expenditure in a situation in which the income embedded in related payments remains untaxed due to non deduction of tax at source by the assessee. In other words, deductibility of expenditure is made contingent upon the income, if any, embedded in such expenditure being brought to tax, if applicable. In effect, thus, a deduction for expenditure is not allowed to the assessees, in cases where assessees had tax withholding obligations from the related payments, without A.Y. 2007-08 corresponding income inclusion by the recipient. That is the clearly discernable bigger picture, and, unmistakably a very pragmatic and fair policy approach to the issue - howsoever belated the realization of unintended and undue hardships to the taxpayers may have been. It seems to proceed on the basis, and rightly so, that seeking tax deduction at source compliance is not an end in itself, so far as the scheme of this legal provision is concerned, but is only a mean of recovering due taxes on income embedded in the payments made by the assessee. That's how, as we have seen a short while ago, Hon'ble Delhi High Court has visualized the scheme of things - as evident from Their Lordships' reference to augmentation of recoveries in the context of "loss of revenue" and "depriving the Government of the tax due and payable".

8. With the benefit of this guidance from Hon'ble Delhi High Court, in view of legislative amendments made from time to time, which throw light on what was actually sought to be achieved by this legal provision, and in the light of the above analysis of the scheme of the law, we are of the considered view that section 40(a)(ia) cannot be seen as intended to be a penal provision to punish the lapses of non deduction of tax at source from payments for expenditure - particularly when the recipients have taken into account income embedded in these payments, paid due taxes thereon and filed income tax returns in accordance with the law. As a corollary to this proposition, in our considered view, declining deduction in respect of expenditure relating to the payments of this nature cannot be treated as an "intended consequence" of Section 40(a)(ia). If it is not an intended consequence i.e. if it is an unintended consequence, even going by Bharti Shipyard decision (supra), "removing unintended consequences to make the provisions workable has to be treated as retrospective notwithstanding the fact that the amendment has been given effect prospectively". Revenue, thus, does not derive any advantage from special bench decision in the case Bharti Shipyard (supra).

9. 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 deincentivize not deducting tax at source, when such tax deductions are due, but, so far a s 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. Deincentivizing 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 A.Y. 2007-08 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 pena ty for tax withholding lapse but it is a sort of compensatory deduction restriction for an incom 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 ection 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 assessees for non deduction of tax at source by declining the deduction in respect of related payments, even when the cor esponding 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.

10. In view of the above discussions, we deem it fit and proper to remit the matter to the file of the Assessing Officer for fresh adjudication in the light of our above observations and after carrying out necessary verifications regarding related payments having been taken into account by the recipients in computation of their income, regarding payment of taxes in respect of such income and regarding filing of the related income tax returns by the recipients. While giving effect to these directions, the Assessing Officer shall give due and fair opportunity of hearing to the assessee, decide the matter in accordance with the law and by way of a speaking order. We order so.

5. We see no reasons to take any other view of the matter than the view so taken by us in the case of Rajeev Kumar Agarwal (supra). Respectfully following the same, we uphold the grievance of the assessee

in principle, and upon necessary verifications, consider deletion of impugned disallowance of Rs 7,26,585. The assessee gets the relief accordingly, if admissible."

13. If we analyse the facts and circumstances of the present case, in the light of ratio laid down by ITAT Agra in order dated 29.5.2014 (supra), we observe that the CIT(A) agreed that the correct rate of TDS applicable on the interest payment was 22.66% and not 10% as applied by the AO, therefore, the impugned amount of interest payment of which TDS of Rs.3,70,021 was required to be made comes to Rs.16,32,925. However, we further observe that the CIT(A) declined to accept the contention of the assessee that since the said interest had been accounted for by the payee J.C. India Ltd. in the income tax return for AY 2009-10, therefore no addition was required to be made u/s 40(a)(ia) of the Act. Ld. CIT(A) proceeded to confirm the addition with this legal proposition that section 40(a)(ia) of the Act provides that where TDS was deductible and the same has not been deducted by the payer, the amount of interest expense is to be disallowed under this provision. The CIT(A) further noted that it is not material whether the person to whom TDS has been paid accounted for i in its books of accounts or not.

14. While we consider the ratio laid down by ITAT Agra in its order dated 29.5.2014 (supra), we find ourselves in agreement with the conclusion that the provisions of section 40a(ia) of the Act as it existed prior to insertion of second proviso went much beyond the obvious intention of the legislature and created undue hardship even in the cases in which asessee's tax withholding lapses did not result in any loss to the exchequer. Subsequently, the legislature has been compassionate enough to cure these shortcomings of provision, and thus obviate the unintended hardships, such as amendment in law. In view of the well-settled legal position to th 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 this situation, agreeing to the said legal proposition of ITAT, Agra, 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 1.4 2005. Hence, respectfully following the legal proposition advanced by ITAT, Agra, we do not see any reason to take a different view on the issue than the view taken by ITAT Agra in the case of Shri Rajeev Kumar Agarwal vs JCIT (supra). Respectfully following the same, we uphold the grievance of the assessee principally and direct that the AO shall give due and fair opportunity of hearing to the assessee and decide the matter afresh in accordance with law by way of a speaking order after carrying out necessary verification regarding impugned payments having been taken into account by the recipients in the computation of their respective income, regarding payment of taxes in respect of such income and regarding filing of related income tax return by the recipients. Accordingly, sole cross objection of the assessee is allowed in principle and deemed to be allowed for verification by the AO in the manner as indicated above.

15. In the result, the appeal of the revenue is dismissed and sole cross objection of the assessee is allowed for statistical purposes.

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