SHREE CHOUDHARY TRANSPORT COMPANY

v.

INCOME TAX OFFICER

(Civil Appeal No. 7865 of 2009)

JULY 29, 2020

[A. M. KHANWILKAR AND DINESH MAHESHWARI, JJ.]

Income Tax Act, 1961:

ss. 40(a)(ia) and 194C – Applicability of – Scope – Deduction of tax at Source – For the assessment year 2005-2006 – Failure by assessee, while making payment to the truck operators engaged by assessee for the purpose of its contract for transportation of goods – Deduction claimed by assessee on account of such payment – Revenue disallowed deduction of payments made to the Truck operators exceeding Rs. 20,000/- without TDS in terms of s. 40(a)(ia) – Appellate Authority held that assessee's case was squarely covered by the provisions of s. 194C and in view of mandatory provisions of s. 40(a)(ia), the payments in question cannot be allowed as deduction while computing the total income of the assessee – Appellate Tribunal as also High Court affirmed the findings of the Authorities – Appeal to Supreme Court – Held: The contract of assessee with consignor company for transport of goods could not have been accomplished without a contract with the truck operator – Thus the truck operators answered the description of 'sub-contractor' for the purpose of s. 194(2) – Thus, in assessee's case s. 194C was applicable and hence it was obliged to deduct tax at source – The disallowance u/s. 40(a)(ia) is not limited to the amount outstanding i.e. 'payable', it equally applies to the amount already incurred and paid by the assessee – Sub-clause (ia) of s. 40(a) has been consciously made applicable by legislature effective from 01.04.2005 and hence would be applicable for the assessment year in question i.e. 2005-2006 – The payments in question have rightly been disallowed from deduction while computing the total income of assessee.

Dismissing the appeal, the Court

HELD: 1. The nature of contract entered into by the appellant with the consignor company makes it clear that the

A **appellant was to transport the goods (cement) of the consignor company; and in order to execute this contract, the appellant hired the transport vehicles, namely, the trucks from different operators/owners. The appellant received freight charges from the consignor company, who indeed deducted tax at source while**
B **making such payment to the appellant. Thereafter, the appellant paid the charges to the persons whose vehicles were hired for the purpose of the said work of transportation of goods. Indisputably, it was the responsibility of the appellant-assessee to transport the goods (cement) of the company; and how to accomplish this task of transportation was a matter exclusively**
C **within the domain of the appellant. Hence, hiring the services of truck operators/owners for this purpose could have only been under a contract between the appellant and the said truck operators/owners. Whether such a contract was reduced into writing or not carries hardly any relevance. In the given scenario**
D **and set up, the said truck operators/owners answered to the description of "sub-contractor" for carrying out the whole or part of the work undertaken by the contractor (i.e., the appellant) for the purpose of Section 194C(2) of the Income Tax Act, 1961. Thus, the provisions of Section 194C were applicable and the assessee-appellant was under obligation to deduct the tax at**
E **source in relation to the payments made by it for hiring the vehicles for the purpose of its business of transportation of goods. [Paras 15.1 and 20][197-G-H][198-A-C; 220-D-E]**

Palam Gas Service v. Commissioner of Income-Tax **(2017) 394 ITR 300 – relied on.**

F *Commissioner of Income-Tax v. Hardarshan Singh* **(2013) 350 ITR 427 – distinguished.**

2.1 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
G **and paid by the assessee. Section 194C is placed in Chapter XVII of the Act on the subject "Collection and Recovery of Tax"; and specific provisions are made in the Act to ensure that the requirements of Section 194C are met and complied with, while also providing for the consequences of default. Section 200**
H **specifically provides for the duties of the person deducting tax to**

deposit and submit the statement to that effect. The consequences of failure to deduct or pay the tax are then provided in Section 201 of the Act which puts such defaulting person in the category of "the assessee in default in respect of the tax" apart from other consequences which he or it may incur. [Para 16][200-D-F]

2.2. Section 40(a)(ia) provides for the consequences of default in the case where tax is deductible at source on any interest, commission, brokerage or fees but had not been so deducted, or had not been paid after deduction (during the previous year or in the subsequent year before expiry of the prescribed time) in the manner that the amount of such interest, commission, brokerage or fees shall not be deducted in computing the income chargeable under "profits and gains of business or profession". In other words, it shall be computed as income of the assessee because of his default in not deducting the tax at source. In the overall scheme of the provisions relating to collection and recovery of tax, it is evident that the object of legislature in introduction of the provisions like sub-clause (ia) of clause (a) of Section 40 had been to ensure strict and punctual compliance of the requirement of deducting tax at source. In the proviso added to clause (ia) of Section 40(a) of the Act, it was provided that where in respect of the sum referable to TDS requirement, tax has been deducted in any subsequent year, or has been deducted during the previous year but paid in any subsequent year after the expiry of the time prescribed in Section 200(1), such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid. [Paras 16.1 and 16.2][200-F-H; 201-A-C]

Commissioner of Income-Tax v. Calcutta Export Company: **(2018) 404 ITR 654 – relied on.**

2.3 The term "payable" has been used in Section 40(a)(ia) of the Act only to indicate the type or nature of the payments by the assessees to the payees referred therein. In other words, the expression "payable" is descriptive of the payments which attract the liability for deducting tax at source and it has not been used in the provision in question to specify any particular class of default on the basis as to whether payment has been made or

A **not. It is not correct to say that the expression "payable" should be read in contradistinction to the expression "paid". Reference to the definition of the term "paid" in Section 43(2) of the Act is of no assistance to the appellant. [Para 16.11][209-G-H]**

**Palam Gas Service v. Commissioner of Income-Tax :*
B **(2017) 394 ITR 300 – relied on.**

J.K. Synthetics Limited v. Commercial Taxes Officer: **(1994) 4 SCC 276 – distinguished.**

P.M.S. Diesels and Ors. v. Commissioner of Income-Tax: **(2015) 374 ITR 562 – approved.**
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P.M.S. Diesels and Ors. v. Commissioner of Income-Tax: **(2015) 374 ITR 562;** *Commissioner of Income-Tax, Kolkata-XI v. Crescent Export Syndicate:* **(2013) 216 Taxman 258;** *Institute of Chartered Accountants of India v. Price Waterhouse* **(1997) 93 Taxman 588 – referred to.**
D

2.4 There is no substance in the plea that the decision in ****Palam Gas Service* **case requires reconsideration. The decision of Co-ordinate Bench in ***Palam Gas Service*** **case on the core question of law is equally binding on this Bench and could be**
E **doubted only if the view, as taken, is shown to be not in conformity with any binding decision of the Larger Bench or any statutory provisions or any other reason of the like nature. The Court finds none. [Para 16.8][206-F-H]**

2.5 It is not correct that scope of Section 40(a)(ia) of the
F **Act cannot be decided on the basis of Section 194C. Section 40(a)(ia) is not a stand-alone provision but provides one of those additional consequences as indicated in Section 201 of the Act for default by a person in compliance of the requirements of the provisions contained in Part B of Chapter XVII of the Act. The**
G **scheme of these provisions makes it clear that the default in compliance of the requirements of the provisions contained in Part B of Chapter XVII of the Act (that carries Sections 194C, 200 and 201) leads, *inter alia*, to the consequence of Section 40(a)(ia) of the Act. Hence, the contours of Section 40(a)(ia) of**

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the Act could be aptly defined only with reference to the requirements of the provisions contained in Part B of Chapter XVII of the Act, including Sections 194C, 200 and 201. When the obligation of Section 194C of the Act is the foundation of the consequence provided by Section 40(a)(ia) of the Act, reference to the former is inevitable in interpretation of the latter. [Para 16.10][207-D-F]

3.1. In income tax matters, the law to be applied is that in force in the assessment year in question, unless stated otherwise by express intendment or by necessary implication. As per Section 4 of the Act of 1961, the charge of income tax is with reference to any assessment year, at such rate or rates as provided in any central enactment for the purpose, in respect of the total income of the previous year of any person. The expression "previous year" is defined in Section 3 of the Act to mean '*the financial year immediately preceding the assessment year*'; and the expression "assessment year" is defined in clause (9) of Section 2 of the Act to mean '*the period of twelve months commencing on the 1st day of April every year*'. Sub-clause (ia) was inserted to clause (a) of Section 40 of the Act with effect from 01.04.2005 by Finance (No.2) Act, 2004. The provision in question, having come into effect from 01.04.2005, would apply from and for the assessment year 2005-2006 and would be applicable for the assessment in question. The legislature consciously made the said sub-clause (ia) of Section 40(a) of the Act effective from 01.04.2005, meaning thereby that the same was to be applicable from and for the assessment year 2005-2006; and neither there had been express intendment nor any implication that it would apply only from the financial year 2005-2006. [Paras 17.4, 17.1 and 17.6][210-B-D; 208-D]

3.2. The requirement of deducting tax at source was already existing as per Section 194C of the Act and it was the bounden duty of the appellant to make such deduction of TDS and to make over the same to the revenue. Section 201 was also in existence which made it clear that default in making deduction in accordance with the provisions of the Act would make the appellant "an assessee in default". The appellant cannot suggest that even if the obligation of TDS on the payments made by him was existing

by virtue of Section 194C(2), he would have honoured such an obligation only if being aware of the drastic consequence of default that such payment shall not be deducted for the purpose of drawing up the assessment. [Para 17.7][211-H; 212-A-B]

3.3. By the amendment in question, clause (ia) was added to Section 40(a) of the Act with a proviso to the effect that where, in respect of the sum referable to TDS requirement, tax has been deducted in any subsequent year, or has been deducted during the previous year but paid in any subsequent year after expiry of the time prescribed in Section 200(1), such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid. The proviso effectively took care of the case of any *bonafide* assessee who would earnestly comply with the requirement of deducting the tax at source. The relaxation by way of the proviso/s to Section 40(a)(ia) of the Act had further been modulated by way of various subsequent amendments to further mitigate the hardships of *bonafide* assessees. [Para 17.7.1][212-C-E]

3.4 If sub-clause (ia) of Section 40(a) of the Act is held applicable only from the financial year 2005-2006, the result would be that this provision would apply only from the assessment year 2006-2007. Such a result is neither envisaged nor could be countenanced. Hence, the contention that sub-clause (ia), of clause (a) of Section 40 of the Act would apply only from the financial year 2005-2006 and cannot apply to the present case pertaining to the financial year 2004-2005 stands rejected. [Para 17.8][212-F-G]

3.5 It is also not correct that disallowance cannot be applied to the payments already made prior to 10.09.2004, the date on which the Finance (No.2) Act, 2004 received the assent of the President of India. The said date of assent of the President of India to Finance (No.2) Act, 2004 is not the date of applicability of the provision in question, for the specific date having been provided as 01.04.2005. Of course, the said date relates to the assessment year commencing from 01.04.2005 (i.e., assessment year 2005-2006). [Para 18][212-G-H; 213-A-B]

3.6 Even if it be assumed that the requirements of Section 40(a)(ia) became known on 10.09.2004, the appellant could have taken all the requisite steps to make deductions or, in any case, to make payment of the TDS amount to the revenue during the same financial year or even in the subsequent year, as per the relaxation available in the proviso to Section 40(a)(ia) of the Act but, the appellant simply avoided his obligation and attempted to suggest that it had no liability to deduct the tax at source at all. Such an approach of the appellant, when standing at conflict with law, the consequence of disallowance under Section 40(a)(ia) of the Act remains inevitable. [Para 18.1][213-B-C]

3.7 The appellant is not correct in saying that the amendment by way of Finance (No.2) Act, 2014, whereby disallowance under Section 40(a)(ia) has been limited to 30% of the sum payable, deserves to be held retrospective in operation. The amendment was specifically made applicable w.e.f. 01.04.2015 and clearly represents the will of the legislature as to what is to be deducted or what percentage of deduction is not to be allowed for a particular eventuality, from the assessment year 2015-2016. [Paras 19 and 19.2][213-D; 216-E]

Commissioner of Income-Tax v. Calcutta Export Company **(2018) 404 ITR 654 – distinguished.**

3.8 The assessee-appellant was either labouring under the mistaken impression that he was not required to deduct TDS or under the mistaken belief that the methodology of splitting a single payment into parts below Rs. 20,000/- would provide him escape from the rigour of the provisions of the Act providing for disallowance. In either event, the appellant had not been a *bonafide* assessee who had made the deduction and deposited it subsequently. Obviously, the appellant could not have derived the benefits that were otherwise available by the curative amendments of 2008 and 2010. Having defaulted at every stage, the attempt on the part of assessee-appellant to seek some succor in the amendment of Section 40(a)(ia) of the Act by the Finance (No.2) Act, 2014 could only be rejected as entirely baseless, rather preposterous. [Para 19.6][220-A-C]

A *Karimtharuvi Tea Estate Ltd. v. State of Kerala* **(1966) 60 ITR 262 – followed.**

Commissioner of Income-Tax, West Bengal v. Isthmian Steamship Lines **(1951) 20 ITR 572 – relied on.**

B *PIU Ghosh v. Deputy Commissioner of Income-Tax & Ors.* **(2016) 386 ITR 322 – not approved.**

4. The payments in question have rightly been disallowed from deduction while computing the total income of the assessee-appellant. The Court does not find any case of prejudice or legal grievance with the appellant. 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, 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, 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. [Para 21][221-A-E]

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Case Law Reference

(2013) 350 ITR 427	**distinguished**	**Para 15.3**
(2017) 394 ITR 300	**relied on**	**Para 15.4**
(2018) 404 ITR 654	**relied on**	**Para 16.3**
(2017) 394 ITR 300	**relied on**	**Para 16.4**
(2015) 374 ITR 562	**referred to**	**Para 16.5**
(2015) 374 ITR 562	**approved**	**Para 16.5.1**
(2013) 216 Taxman 258	**referred to**	**Para 16.5.1**
(1994) 4 SCC 276	**distinguished**	**Para 16.11**
(1997) 93 Taxman 588	**referred to**	**Para 16.11**
(2016) 386 ITR 322	**not approved**	**Para 17.1**
(1951) 20 ITR 572	**relied on**	**Para 17.5**
(1966) 60 ITR 262	**followed**	**Para 17.5**
(2018) 404 ITR 654	**distinguished**	**Para 19**

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 7865 of 2009.

From the Judgment and Order dated 15.05.2009 of the Rajasthan High Court at Jodhpur in D.B. Income Tax Appeal No. 164 of 2008.

Vikramjit Banerjee, ASG, V. Shekhar, Sr. Adv., Puneet Jain, H.D. Thanvi, Rishi Matoliya, Ms. Christi Jain, Shashank Shekhar, Ms. Sheetal Rajput, Sarad Kumar Singhania, Ms. Praveena Gautam, Ms. Purnima Bhat Kak, Ms. Siddhartha Sinha, Abhishek Mahajan, Mrs. Anil Katiyar, B. V. Balaram Das Advs. for the appearing parties.

A The Judgment of the Court was delivered by

DINESH MAHESHWARI, J.

Preliminary

1. By way of this appeal, the assessee-appellant has called in
B question the order dated 15.05.2009 passed in Income Tax Appeal No. 164 of 2008 whereby, the High Court of Judicature for Rajasthan at Jodhpur has summarily dismissed the appeal against the orderdated 29.08.2008 passed in ITA No. 117/JU/2008 by the Income Tax Appellate Tribunal, Jodhpur Bench at Jodhpur; and thereby, the High Court has upheld the computation of total income of the assessee-appellant for the
C assessment year 2005-2006 with disallowance of payments to the tune of Rs. 57,11,625/-, essentially in terms of Section 40(a)(ia) of the Income Tax Act, 1961[1],for failure of the assessee-appellant to deduct the requisite tax at source[2].

2. We may take note of the relevant factual and background
D aspects of the case while keeping in view the root point calling for determination in this appeal, that is,as to whether the payments in question have rightly been disallowed from deduction in computation of total income of the appellant?

Relevant factual and background aspects; the impugned
E **order of assessment**

3. In a brief outline of the relevant factual aspects, it could be noticed that the assessee-appellant, a partnership firm, had entered into contract with M/s Aditya Cement Limited, Shambupura, District Chittorgarh[3] for transporting cement to various places in India. As the
F appellant was not having the transport vehicles of its own, it had engaged the services of other transporters for the purpose.The cement marketing division of M/s Aditya Cement Limited, namely, M/s Grasim Industries Limited,effected payments towards transportation charges to the appellant after due deduction of TDS, as shown in Form No. 16A issued by the
G company.

4. On 28.10.2005, the assessee-appellant filed its return for the assessment year 2005-2006, showing total income at Rs. 2,89,633/- in

[1] Hereinafter referred to as 'the Act of 1961' or simply 'the Act'.
[2] 'Tax deducted at source' being referred as 'TDS'
H [3] Hereinafter also referred to as "the consignor company" or "the company".

the financial year 2004-2005 arising out of the business of 'transport contract'.

5. In the course of assessment proceedings, the Assessing Officer[4] examined the dispatch register maintained by the appellant for the period 01.04.2004 to 31.03.2005, containing all particulars as regards the trucks hired, date of hire, biltyand challan numbers, freight and commission charges, net amount payable, the dates on which the payments were made, and the destination of each truck etc. The contents of the register also indicated that each truck was sent only to one destination under one challan/bilty;and if one truck was hired again, it was sent to the same or other destination/trip as per separate challan/bilty. The commission charged by the appellant from the truck operators/owners ranged from Rs. 100/- to Rs. 250/-per trip.

5.1. On verifying the contents of record placed before him, the AO observed that while making payment to the truck operators/owners, the appellant had not deducted tax at source even if the net payment exceeded Rs. 20,000/-. Following this, a notice dated 05.11.2007 was issued to the appellant, requiring the details of amount paidto the truck operators/owners, TDS thereupon, and date of depositing the same in the Government account. In reply, by its letters dated 12.11.2007 and 15.11.2007, the appellant contended, *inter alia*, that the trucks hired were belonging to different operators/owners who were not the sub-contractors or contractors; that they came from different parts of India and mostly required cash payment for diesel and other running expenses; thatthe appellant had no liability to deduct tax at source because it had not made payments exceeding Rs. 20,000/- in a single transaction; and that the provisions of Section 40(a)(ia) were not applicable to the appellant.

5.2. While drawing up the assessment order dated 22.11.2007, the AO observed that the payments to different truck operators/owners were made directly by the appellant firm and not the consignor company; that the appellant firm was responsible for transportation of goods of the company as per the contract for which, the appellant received payment from the company after tax being deducted at source therefrom. The AO also observed that the appellant firm paid freight charges to the truck operators/owners from the income so earned; and the remaining amount was shown as commission. Looking to the nature of dealings of the parties, the AO observed that there existed a contract between the

[4] 'AO' for short

A appellant and the truck operators/owners in respect of each challan/bilty for transportation. The AO also referred to the Circular bearing No. 715 dated 08.08.1995 issued by the Central Board of Direct Taxes[5], to observe that each goods receipt could be considered a separate contract. While further observing that a contract may be written or oral, the AO held that when the truck operators/owners in the case at hand were not to be considered as contractors, they were undoubtedly the sub-contractors of the appellant. The AO also pointed out that despite sufficient opportunity being given, a copy of the agreement of the appellant firm with the company for providing transportation services was not furnished.

C 5.3. Having perused the material placed before him, the AO held on the appellant's responsibility for deducting tax at source while making payment to the truck operators/owners where such payment exceeded Rs. 20,000/- on a single bilty/challan or goods receipt in the following words:-

D "The dispatch register of the assessee firm as well as the cash book clearly establish beyond doubt that payment to the truck operators was made by the assessee firm. In other words, the assessee firm was the person responsible for deducting the tax at source therefrom within the meaning of Section 194C of the Act. Since the goods were transported by trucks and every truck E transported goods under a separate bilty and challan to a particular destination, there was a contract or sub-contract between the assessee firm and the truck operator as per the provisions of Section 194C of the Act and Board's circular supra, and the assessee should have deducted tax at source while making payment to the truck operators as per the provisions of Section 194C(3) of F the Act where the amount of any sum credited or paid or likely to be credited or paid to the account of, or to the contractor or sub-contractor exceeded twenty thousand rupees.

*** *** ***

G From the facts and circumstances of the case discussed above the final position emerging is that in view of the provisions of Section 194C of the Act the assessee was liable to deduct tax at source while making payment to truck owners/operators where such payment exceeded Rs. 20,000/- on the basis of single bilty/ challan or GR."

H [5] 'CBDT' for short

5.4. After examining the details contained in the dispatch register, cash book and payment vouchers, the AO found that tax was not deducted at source by the appellant while making payment to the truck operator/ owner, even though the payment under a single goods receipt (challan/ bilty) exceeded the sum of Rs. 20,000/-. Thereupon, the assessee-appellant was called upon to explain as to why deduction claimed on account of such payment from the income be not disallowed in terms of Section 40(a)(ia) of the Act. In the order of assessment, the AO took note of and dealt with various submissions made on behalf of the assessee-appellant in this regard as follows:-

> "Since the assessee failed to deduct the tax at source while making payment to truck owners/ operators exceeding Rs. 20,000/-, the assessee was asked to explain as to why deduction claimed on account of such payments from the income be not disallowed within the meaning of Section 40(a)(ia) of the Act. The learned counsel of the assessee firm stated that there was no payment exceeding Rs. 20,000/-. In this regard he furnished photocopy of extract of cash book and also payment vouchers which indicate that each payment exceeding Rs. 20,000/- was shown in the cash book in two parts though paid on the same date and the assessee made two separate vouchers for such payment just to give an impression that payment to truck owners/ operators was not exceeding Rs. 20,000/-. **In this regard it is pertinent to mention that merely by showing payment of one challan/ bilty in two pieces the assessee cannot absolve itself of the provisions of the Section 40(a)(ia)** inasmuch as Section 194C(3)(i) clearly speaks of – "the amount of any sum credited or paid or likely to be credited or paid to the account of, or to, the Contractor or sub-contractor, if such sum does not exceed twenty thousand rupees". The learned counsel further submitted that the receipts of the assessee firm are full vouched and verifiable and subject to TDS and the payments to truck owners/ operators are made by the assessee firm from such receipts and as such there as no need for further TDS. He further stated that the assessee firm prepares bills for claiming payments from the company on the basis of freight charges payable to various truck owners/ operators and when the payment is received on the basis of such bills, further payment is made to the truck owners/ operators and nominal commission is retained by the assessee and, therefore, the payment

A made to the truck owners/ operators was out of the purview of Section 194C of the Act. He further stated that it is not practical to deduct tax at source while making payment to a truck owner/ operator because no truck owner accepts payment after TDS. This argument put forth on behalf of the assessee firm is not acceptable inasmuch as Section 194C(1) clearly says that - "Any person responsible for paying any sum to any resident……." **Since the assessee firm was responsible for making payment to the truck owners operators, it was mandatory on the part of the assessee to deduct tax at source while making such payment. Further there is no direct nexus between the Company and the truck owners/operators and thus it cannot be said that the assessee firm was a mediator between the company and the truck owners/ operators**….."

(emphasis in bold supplied)

D 5.5. In view of the above, the AO proceeded to disallow the deduction of payments made to the truck operators/owners exceeding Rs. 20,000/- without TDS, which in total amounted to Rs. 57,11,625/-; and added the same back to the total income of the assessee-appellant. The AO also disallowed a lump sum of Rs. 20,000/- from various expenses debited to the Profit and Loss Account and finalised the assessment, E accordingly, as under:-

"Therefore, considering the provisions of Section 194C, Section 40(a)(ia) and Board's Circular No. 715, dated 08.8.1995, the payment made to the truck owners/operators, exceeding to Rs. 20,000/- without deducting tax at source is disallowed and added F back to the total income of the assessee firm which works out to Rs. 57,11,625/-, supra. The assessee has 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/-.

The assessee has shown commission income of Rs. 6,23,300/- on G which net profit of Rs. 2,89,694/- has been shown giving N.P. rate of 46.47% as against N.P. rate of 50.91% declared in the immediate preceding year on commission income of Rs. 6,00,450/ -. The N.P. rate declared this year is on the lower side. Considering the nature of various expenses debited to the Profit and Loss Account like Staff Welfare Expenses, Telephone Expenses, H Travelling expenses, Motor Cycle Repairs etc. where involvement

of personal element cannot be ruled out, a lump sum disallowance of Rs. 20,000/- is made to the declared income."

Before the Commissioner of Income Tax (Appeals), Jodhpur

6. Aggrieved by the order so passed by the Assessing Officer, the assessee-appellant preferred an appeal before the Commissioner of Income Tax (Appeals)[6], being Appeal No. 183 of 2007-08, that was considered and dismissed on 15.01.2008.

6.1. The CIT(A) re-examined the record and rejected the contentions of the appellant that it had only received commission income and was not liable to deduct tax at source on payments made to the truck owners while observing as under:-

"On careful consideration of the material facts, it is observed that the appellant entered into a contract for transportation of goods (cement) with M/s Aditiya Cement Limited in order to honour the contract, the appellant hired various trucks all through out the year for the purpose of transportation of cement. The appellant received freight charges from M/s Aditiya Cement Limited on which tax was deducted. The appellant paid freight charges to individual truck owners, after transportation of goods. **There was no nexus between the truck owners/operators and M/s Aditiya Cement Limited. How the appellant transported the goods (cement) was the exclusive domain of the appellant firm. Under such circumstances, the gross freight received by the appellant from M/s Aditiya Cement Limited represents gross income of the appellant firm. Since the appellant made payments to various truck owners/ operators. Such payments represent expenditure.** It may be mentioned here that the payments to the truck owners/ operators were made only after the goods were transported by them satisfactorily at the given destinations. In other words, there existed a contract or a sub-contract between the appellant firm and the transporters. Under such circumstances, the appellant was required to deduct tax at source on the payments made to truck drivers/ owners within the meaning of provisions of Section 40(a)(ia) read with Section 194C of the Act. Under no circumstances, it can be said that the appellant only received

[6] 'CIT(A)' for short

commission income and therefore provisions of Section 194C are not applicable."

(emphasis in bold supplied)

6.2. In regard to the contention that the appellant was not required to deduct tax at source when no payment exceeded Rs. 20,000/-, the CIT(A) found that the appellant had, for its convenience and to avoid the rigour of Section 40A(3) of the Act, chose to split the payments into two parts but the entries of such split payments were available consecutively in the cash book. Thus, while not accepting such methodology, the CIT(A) observed that even in the split payments, it was required of the appellant to deduct tax at the time of making final payment. The relevant observation of the CIT(A)read as under:-

"The facts have been gone through and it is observed that the appellant made payments in a manner according to which individual payment to the truck owner(s) did not exceed Rs. 20,000/-. In other words, the payment was splitted into two parts. However, the total amount paid to the truck owner(s) for individual contract exceeded Rs. 20,000/-. For instance, cashbook dated 31-1-2005 of the appellant shows payments of Rs. 14,750/- and Rs. 10,510/- to Truck No.RJ14-G-5599 for transport of cement from the premises of the Cement Company to Bhatinda. The same cashbook page also shows payments of Rs. 14,750/- and Rs. 9,431/- to Truck No.RJ23-G-3041 for transport of cement. It is the argument that since the individual payment did not exceed Rs. 20,000/-, the provisions of Section 194C are not applicable. On careful consideration of the material facts, **it is observed that both the entries are consecutive in the cashbook and, therefore, it is observed that the appellant, for its convenience and to avoid rigors of the provisions of Section 40A(3), splitted the payments into two parts.** Had the payments been really made in two parts, both the entries should not have been consecutive. It is also not understood as to why the truck owners after completing the contract, would accept the amount in two parts and why they would come to the office of the appellant twice for seeking payments. **The theory of making payments in two parts is merely a story, which is capable neither on facts nor on practicability.** It is also surprising to

note that in none of the case the appellant made fully payment to any truck owner all through out the year exceeding Rs.20,000/."

(emphasis in bold supplied)

6.3. The CIT(A) also examined in detail the question as to whether transport contracts were subject to deduction of tax at source and, with reference to clause (c) of *Explanation* (iii) of Section 194C of the Act as also to CBDT Circular Nos. 558 dated 28.03.1990 and 681 dated 08.03.1994, held that the provisions of Section 194C of the Act were applicable to the contracts for transportation of goods; and the appellant was required to deduct tax at source if the gross credited or paid or likely to be credited or paid exceeded the limit of Rs. 20,000/-. Having found that the appellant's case was squarely covered within the provisions of Section 194C of the Act, the CIT(A) held that in view of the mandatory provisions of Section 40(a)(ia) of the Act, the payments in question cannot be allowed as deduction while computing total income. Thus, the CIT(A) proceeded to dismiss the appeal while holding, *inter alia*, as under:-

"It is, therefore, clear that the appellant's case was squarely covered within the provisions of the Section 194C and, therefore, it was required to deduct tax at sources while making payments to the truck owners.

Provisions of Section 40(a)(ia) clearly provide that if any amount payable to a contractor or subcontractor 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 during the previous year, or in the subsequent year before the expiry of the time prescribed under sub-section (1) of Section 200, such sum shall not be allowed as a deduction while computing the total income. As can be seen, the provisions are mandatorily to be complied with in the case a default and the question of existence of any reasonable cause has got no meaning.

In the light of the entire discussion as above, I hold that the appellant was required by the provisions of the Act to deduct tax on freight payments totalling to Rs.57,11,625/-. Since the appellant failed to deduct tax at source the sum of Rs.57,11,625/- was rightly disallowed by the Ld. AO. The Ld. AO rightly invoked the provisions of Section 40(a)(ia) of the Act. Therefore, on the given facts as also in law, the ground of appeal fails."

Before the Income Tax Appellate Tribunal, Jodhpur Bench

7. Aggrieved again, the appellant approached the Income Tax Appellate Tribunal, Jodhpur Bench[7] in further appeal, being ITA No. 117/JU/2008. This appeal was considered and dismissed by ITAT by way of its order dated 29.08.2008.

7.1. The ITAT pointed out that by an application dated 16.07.2008, the appellant sought permission to produce additional evidence i.e., the agreement dated 01.04.2003 executed between itself and M/s Grasim Industries Limited, and as the Department had no-objection, the same was admitted as additional evidence by the order dated 17.07.2008but, another application for admission of evidence in shape of affidavit of partner of the appellant firm,was objected to by the Department and was rejected.

7.2. The ITAT found that the agreement in questionwas on principal to principal basis whereby, the appellant was awarded the work of transporting cement from Shambupura but, as the appellant did not own any trucks, it had engaged the services of other truck operators/owners for transporting the cement; and such a transaction was a separate contract between the appellant and the truck operator/owner. The ITAT, therefore, endorsed the findings of AO and CIT(A) in the following words:-

> "13.The perusal of agreement on record reveals that the assessee was awarded a works contract by M/s. Grasim Industries Limited, a cement marketing division of M/s. Aditya Cement Ltd. This agreement was on principal to principal basis whereby the appellant was awarded the cement transportation work and in terms of agreement the scope of work was to include placement of trucks for cement transportation from their plant at Shambupura on regular basis in the state of Rajasthan. In case the assessee failed to provide trucks as per contractual obligation, the company was free to hire trucks from market at prevailing prices and the amount of expenses incurred if any was to be debited to the assessee's account terming him to be a transporter. The assessee merely acted as an independent contractor while carrying on the aforesaid work contract awarded to it by M/s. Grasim Industries Limited. Admittedly, the appellant did not own trucks of its own for carrying

[7] 'ITAT' for short

out such transportation contract and has engaged the services of other truck owners/operators for lifting goods from the premises of M/s Grasim Industries Limited and transporting the same to various sites in Rajasthan. Goods receipt [GR]/bilty were prepared and the same was to be taken as a contract between the appellant and such truck owners/operators. A clarification to this effect given vide Board Circular No. 715 dated 8.8.1995 has been brought on record by the Revenue and strongly relied upon by the assessing authority as well so as to consider the goods carried under particular goods/receipt/bilty as a separate contract. The assignment of such contract by the appellant to the truck operators/owners was rightly taken as a sub contract for carrying out the job awarded to the assessee by M /s. Grasim Industries Limited. Provisions of Section 194C were duly attracted to such payments which have been made/credited or was likely to be paid on account of obligation under each goods receipt/bilty. The assessing authority has found that the payments made and credited with respect to each of such contracts involving aggregate payment of Rs. 20,000/- on a particular day amounted to Rs. 57,11,625/-. In the light of clear provisions contained in Section 194C of the Act and having regard to the fact that both the amounts actually paid or credited or likely to be paid on account of each contract exceeded Rs. 20,000/- on a single day. Section 194C has rightly found applicable. We, therefore, do not find any wrong committed by the ld. CIT(A) in holding that the assessee has committed default in making deduction with respect to payments aggregating to Rs. 57,11,625/- without deduction of tax at source."

7.3. The ITAT also negated the argument that by the time of issuance of Circular No. 5 dated 15.07.2005, the time for payment of tax at source had expired and that Section 40(a)(ia) would only be applicable from the assessment year 2006-2007 and not from the assessment year 2005-2006. The ITAT also referred to the proviso to Section 40(a)(ia) of the Act and pointed out that thereunder, the assessee was eligible to get deduction of such expenditure in a subsequent year in which TDS was actually paid to the Government. The ITAT observed in regard to these two aspects concerning applicability of the provision in question as also the effect of proviso thereto, in the following passage:-

A "15. The assessee's counsel also raised a plea that Circular No. 5 was issued only on 15-7-2005 by which date the time for payment of tax at source has also expired and as such it was contended that the provisions as contained in Section 40(a)(ia) of the Act would be applicable not from A.Y. 2005-06 but from 2006-07. We,however, do not subscribe to the view so canvassed by the assessee. The Finance (No.2) Act 2004 has brought an amendment in Section 40 of the Act making it applicable w.e.f. 01/04/2004 (*sic*)[8]. **Since this amendment came before close of the financial year ended on 31/03/2005 in the statute books, the assessee cannot be held to be ignorant of its liability to deduct tax at source.** The subsequent board circular issued is merely clarificatory. The amendment in Section 40 of the Act does not take away the right of the assessee to claim deduction for such expenses for all times to come. It only mandates that the deduction shall not be allowed in the relevant year in which there was liability to deduct and pay tax at source but the same has not been paid before the expiry of the time prescribed under sub-section (1) of Section 200 of the act. **It also had proviso clause whereby the assessee was eligible to get deduction of such expenditure in a subsequent year in which such tax deducted at source has actually been paid.** The plea raised by the assessee, therefore, does not support the claim."

(emphasis in bold supplied)

7.4. The ITAT further rejected the contention that the amount of expenditure was not charged to the Profit and Loss Account and only commission was shown as income. The ITAT observed that mere reflection in two different account books would not qualify for distinct and different treatment since both freight paid and freight charged partake the same character. The ITAT, accordingly, dismissed the appeal.

Before the High Court

8. Aggrieved yet again, the appellant approached the High Court in D.B. Income Tax Appeal No. 164 of 2008 against the order passed by

[8] The extraction is from the typed copy of the order of ITAT, placed on record as Annexure P-5 (at page 84 of the paper book) but there is obvious typographical error on this date "01.04.2004" because the amendment of Section 40 of the Act of 1961 by the Finance (No.2) Act, 2004 was made applicable with effect from "01.04.2005". The effect and implication of the relevant date is examined in Question No. 3 *infra*.

ITAT. However, the appeal so filed was dismissed summarily by the High Court,by its short order dated 15.05.2009 that reads as under:-

> *"*In our view, on the language of Section 194C(2), and the fact that the good received were sent through truck owners by the appellant, and there was no privity of direct contract between the truck owners and the cement factory. According to the contract between the appellant and the cement factory, it was the appellant's responsibility to transport the cement, and for that the appellant hired the services of the truck owners, obviously as sub-contractors. In that view of the matter, we do not find any error in the impugned order of the Tribunal. The appeal is, therefore, dismissed summarily.*"*

9. Thus, the net result of the proceedings aforesaid had been that theconsistent views of the AO, CIT(A) and ITAT, that deduction, of the payments made to the truck operators/owners, cannot be allowed while computing the total income of the assessee-appellant, came to be affirmed by the High Court.

Rival Submissions

Appellant

10. Assailing the order so passed by the High Court in summary dismissal of the appeal as also the views expressed in the assessment and appellate orders, learned counsel for the assessee-appellant has urged before us multiple contentions on the scope and applicability of Section 194C of the Act as also Section 40(a)(ia) thereof and has argued that these provisions could not have been applied to the case at hand.

10.1. Learned counsel for the appellant has strenuously argued that the provisions of Section 194C of the Act of 1961, particularly sub-section (2) thereof,were not applicable to the present case for there was no oral or written contract of the appellant with the truck operators/ owners, whose vehicles were engaged to execute the work of transportation of the goods. It has been contended that the liability under Section 194C(2) would have arisen only if payments were made to "sub-contractor" and that too "in pursuance of a contract" for the purpose of "carrying whole or any part of work undertaken by the contractor". The learned counsel for the appellant would argue that when there had not been any specific contract between the appellant and the truck owners, whose vehicles were hired by the appellant on freelance and need basis,

A the ingredients of Section 194C(2) were not satisfied and the obligation of deducting tax at source could not have been fastened on the appellant.

10.1.1. The learned counsel has supported his contentions against the applicability of Section 194C of the Act to the present case with reference to the decision of Delhi High Court in the case of B ***Commissioner of Income-Tax v. Hardarshan Singh*: (2013) 350 ITR 427** wherein it was held that when the assessee merely acted as facilitator or intermediary in the process of transportation of goods, he had no liability to deduct TDS under Section 194C of the Act.

10.2. The main plank of the submissions of learned counsel for C the appellant has been that disallowance under Section 40(a)(ia) of the Act is confined to the expenses that are booked during the year but remain payable or outstanding and not the expenses that had already been paid. The learned counsel has referred to the decision of this Court in the case of ***J.K. Synthetics Limited v. Commercial Taxes Officer*: (1994) 4 SCC 276;** and the definition of the term "paid" in Section D 43(2) of the Act to submit that the two expressions "payable" and "paid" are of entirely different connotations. The learned counsel has painstakingly referred to the contents of the Bill introducing the Finance (No.2) Act of 2004 where the expressions"credited or paid"were used but in the provision as enacted, the expression "payable" has occurred. E According to the learned counsel, if the legislature intended to disallow the deduction towards the payments made and incurred, it would have used the expression "paid", which term has been specifically defined for the purposes of Sections 28 to 41 of the Act but the use of expression "payable" makes it clear that the coverage of the provision is restricted and in any case, itis not applicable over the amount already paid. The F learned counsel has also attempted to draw support to his contentions with reference to the contents of the proviso to Section 40(a)(ia) of the Act with the submissions that the meaning and scope of the main provision is accentuated by the scope of proviso wherein, the expression "paid" is used while giving out the circumstances when a deduction, not allowed G under the main provision, could be claimed in the subsequent year.

10.2.1. Taking this line of argument further, learned counsel would contend that the scope of Section 40(a)(ia) of the Act cannot be decided on the basis of the scope of Section 194C of the Act. Learned counsel would submit that Section 201 of the Act provides for consequence of H non-deduction of TDS either at the time of payment or booking, whichever

is earlier; and thus, the said provision would apply to both the situations where the expenses amount has been "paid" or is "payable". However, according to the learned counsel, the additional consequence of default as provided in Section 40(a)(ia) of the Actwould come into operation only if the alleged default strictly falls within the language of this provision, which is limited to the amount "payable". Learned counsel would submit that the scope of Section 40(a)(ia) of the Act cannot be expanded beyond its language merely because as per Section 194C, the liability to deduct tax is at the time of "credit of such amount to the account of a contractor" or at the time of "payment" whichever is earlier. With reference to the decision of this Court in the case of ***Institute of Chartered Accountants of India v. Price Waterhouse:*** **(1997) 93 Taxman 588,** the learned counsel has argued that when the words are clear and there is no obscurity, the intention of legislature has to be inferred only from the words used in the provision.

10.2.2. Thus, learned counsel for the appellant has strenuously argued that Section 40(a)(ia) of the Act remains limited in its scope and does not apply to the amount already "paid". However, being aware of the position that the substratum of such contentions does not stand in conformity with the view already taken by this Court in the case of ***Palam Gas Service v. Commissioner of Income-Tax*** **: (2017)394 ITR 300,** the learned counsel has made elaborate submissions that the said decision in ***Palam Gas Service*** requires reconsideration. According to the learned counsel, such reconsideration isnecessitated because of the factorsthat: (a) the taxing provision for disallowance has to be strictly construed as per the language used and there is no scope for adopting the so-called purposive construction; (b) the change of words used in the Bill "credited or paid" to the word "payable" has been ignored; (c) the effect of proviso making it clear that the intent of the main provision isonly to disallow the outstanding or payable amounts has not been considered; and (d) the Court has widened the scope of consequences provided under Section 40(a)(ia) of the Act based on the scope of Sections 194C and 201 of the Act, although such an approach is impermissible while interpreting a provision in the taxing statute.

10.3. Learned counsel for the appellant has argued in the alternative that the said sub-clause (ia), having been inserted to clause (a) of Section 40 of the Act with effect from 01.04.2005 by the Finance (No.2) Act, 2004, would apply only from the financial year 2005-2006

A and hence, cannot apply to the present case pertaining to the financial year 2004-2005. In support, the learned counsel has referred to and relied upon the decision of Calcutta High Court in the case of ***PIU Ghosh v. Deputy Commissioner of Income-Tax & Ors.*****: (2016) 386 ITR 322**. Supplemental to these contentions, the learned counsel has also argued that, in any case, the Finance (No.2) Act, 2004 received the assent of the President of India on 10.09.2004 and hence, the rigour of sub-clause (ia) of Section 40(a) of the Act cannot be applied in relation to the payments already made before 10.09.2004, the date of introduction of this provision.

C 10.3.1. In yet another alternative, learned counsel for the appellant has referred to the amendment made to Section 40(a)(ia) of the Act by the Finance (No.2) Act, 2014,restricting and limiting the extent of disallowance to 30% of the expenditure and has submitted that the said amendment, being curative in nature and having been introduced to ameliorate the hardships faced by the assessees, deserves to be applied D retrospectively and from the date of introduction of sub-clause (ia) to Section 40(a)of the Act. The learned counsel has developed this argument by relying on the decision in ***Commissioner of Income-Tax v. Calcutta Export Company:*** **(2018) 404 ITR 654,** wherein this Court has held the remedial amendment of Section 40(a)(ia) of the Act by the Finance Act, 2010 to be retrospective in nature and applicable from the date of E insertion of the said provision.

10.4. Learned counsel for the appellant has lastly submitted that the result of applying the provisions in question to the entire payment practically leads to a highly incongruous position thatwhole of the receipt from company is treated as the income of the appellantand taxed F accordingly, but without due provision towards necessary expenses. According to the learned counsel, in such contracts, the annual income of the transport contractor like the appellant cannot be, and is not, to the extent of about Rs. 57 lakhs, as sought to be taxed in the present matter.

Respondent

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11. *Per contra*, the learned counsel for respondent-revenue has duly supported the orders impugned, essentially with reference to the reasonings therein and also with reference to the decision of this Court in ***Palam Gas Service*** (supra).

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11.1. Learned counsel for the revenue has, in the first place, contended with reference to the decided cases that the concurrent findings of fact recorded by the authorities and ITAT, as affirmed by the High Court call for no interference for no case of apparent perversity being made out.

11.2. Learned counsel has further submitted that the appellant admittedly carried out the work of transportation by hiring the trucks and made payments to the operators/owners while issuing an invoice/bilty/challan for every such hiring, which constituted a separate contract/sub-contract. According to the learned counsel, in such dealings, the appellant was required to deduct tax at source in terms of Section 194C of the Act when making payment to any truck operator/owner in the sum exceeding Rs. 20,000/-; and the appellant having failed to do so, the provisions of Section 40(a)(ia) have rightly been invoked.

11.3. Learned counsel for the revenue hasmade elaborate reference to the decision of this Court in the case of ***Palam Gas Service*** (supra) and has submitted that the principal contention on the part of the appellant, that the expression "payable", as occurring in Section 40(a)(ia) of the Act, refers only to those cases where the amount is yet to be paid and does not cover the cases where the amount is actually paid, has been duly considered and specifically rejected by this Court; and the said decision squarely covers the present matter. The learned counsel has argued that in the case of ***Palam Gas Service*** (supra), this Court having holistically examined the scheme of the provisions in question, there is no scope for reconsideration of the said decision; and this appeal deserves to be dismissed for the question sought to be raised as regard interpretation of Section 40(a)(ia) of the Act being no more *res integra*.

11.4. Learned counsel for the revenue has further contended that the amendment to Section 40(a) of the Act with insertion of sub-clause (ia) by the Finance (No. 2) Act, 2004 with effect from 01.04.2005 directly applies to the assessment year 2005-2006; and for the appellant having failed to deduct tax at source from the payment made to the sub-contractors for the work of transportation, deduction of such payment has rightly been disallowed.

11.5. The learned counsel has also argued that the proviso to Section 40(a)(ia) of the Act, as inserted by the Finance Act, 2014, does not apply to the case at hand pertaining to the assessment year 2005-

A 2006 and hence, the argument for curative benefit with reference to the said proviso does not hold the ground.

Questions for determination

12. Having regard to the submissions made by the learned counsel for the parties and the observations occurring in the orders impugned, the principal questions arising for determination in this appeal could be stated as follows:-

1. As to whether Section 194C of the Act does not apply to the present case?

2. As to whether disallowance under Section 40(a)(ia) of the Act is confined/limited to the amount "payable" and not to the amount "already paid"; and whether the decision of this Court in ***Palam Gas Service v. Commissioner of Income-Tax*: (2017) 394 ITR 300** requires reconsideration?

3. As to whether sub-clause (ia) of Section 40(a) of the Act, as inserted by the Finance (No. 2) Act, 2004 with effect from 01.04.2005, is applicable only from the financial year 2005-2006 and, hence, is not applicable to the present case relating to the financial year 2004-2005; and, at any rate, whole of the rigour of this provision cannot be applied to the present case?

4. As to whether the payments in question have rightly been disallowed from deduction while computing the total income of the assessee-appellant?

Relevant Provisions

13. For determination of the questions aforesaid, we need to closely look at the statutory provisions in the Act of 1961 which have material bearing on this case.

13.1. It is noticed that elaborate provisions have been made in Chapter XVII of the Act of 1961 for "Collection and Recovery of Tax" and Part B thereof carries the provisions concerning *"Deduction at Source"*. Sections 194C, 200 and 201, which have come in reference in the present matter, are contained in this part and the same, as existing at the relevant point of time pertaining to the assessment year 2005-2006, may be usefully noticed.

13.1.1. The liability against the appellant has basically arisen because of its alleged non-compliance of the requirements of Section 194C of the Act. At the relevant point of time,this provision readas under:-

"194C. Payments to contractors and sub-contractors.-

(1) Any person responsible for paying any sum to any resident (hereafter in this section referred to as the contractor) for carrying out any work (including supply of labour for carrying out any work) in pursuance of a contract between the contractor and-

(a) the Central Government or any State Government; or

(b) any local authority; or

(c) any corporation established by or under a Central, State or Provincial Act; or

(d) any company; or

(e) any co-operative society; or

(f) any authority, constituted in India by or under any law, engaged either for the purpose of dealing with and satisfying the need for housing accommodation or for the purpose of planning, development or improvement of cities, towns and villages, or for both; or

(g) any society registered under the Societies Registration Act, 1860 (21 of 1860) or under any law corresponding to that Act in force in any part of India; or

(h) any trust; or

(i) any University established or incorporated by or under a Central, State or Provincial Act and an institution declared to be a University under section 3 of the University Grants Commission Act, 1956 (3 of 1956); or

(j) any firm,

shall, at the time of credit of such sum to the account of the contractor or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct an amount equal to-

(i) one per centin case of advertising,

A (ii) in any other case two per cent,

of such sum as income-tax on income comprised therein.

(2) Any person (being a contractor and not being an individual or a Hindu undivided family) responsible for paying any sum to any resident (hereafter in this section referred to as the sub-contractor) in pursuance of a contract with the sub-contractor for carrying out, or for the supply of labour for carrying out, the whole or any part of the work undertaken by the contractor or for supplying whether wholly or partly any labour which the contractor has undertaken to supply shall, at the time of credit of such sum to the account of the sub-contractor or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct an amount equal to one per cent of such sum as income-tax on income comprised therein:

Provided that an individual or a Hindu undivided family, whose total sales, gross receipts or turnover from the business or profession carried on by him exceed the monetary limits specified under clause (a) or clause (b) of section 44AB during the financial year immediately preceding the financial year in which such sum is credited or paid to the account of the sub-contractor, shall be liable to deduct income-tax under this sub-section.

Explanation I.- For the purposes of sub-section (2), the expression "contractor" shall also include a contractor who is carrying out any work (including supply of labour for carrying out any work) in pursuance of a contract between the contractor and the Government of a foreign State or a foreign enterprise or any association or body established outside India.

Explanation II. -For the purposes of this section, where any sum referred to in sub-section (1) or sub-section (2) is credited to any account, whether called "Suspense account" or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this section shall apply accordingly.

Explanation III. – For the purposes of this section, the expression "Work" shall also include-

(a) advertising;

(b) broadcasting and telecasting including production of programmes for such broadcasting or telecasting;

(c) carriage of goods and passengers by any mode of transport other than by railways;

(d) catering.

(3) No deduction shall be made under sub-section (1) or sub-section (2) from-

(i) the amount of any sum credited or paid or likely to be credited or paid to the account of, or to, the contractor or sub-contractor, if such sum does not exceed twenty thousand rupees:

Provided that where the aggregate of the amounts of such sums credited or paid or likely to be credited or paid during the financial year exceeds fifty thousand rupees, the person responsible for paying such sums referred to in sub-section (1) or, as the case may be, sub-section (2) shall be liable to deduct income-tax under this section; or

(ii) any sum credited or paid before the 1st day of June, 1972; or

(iii) any sum credited or paid before the 1st day of June, 1973, in pursuance of a contract between the contractor and a co-operative society or in pursuance of a contract between such contractor and the sub-contractor in relation to any work (including supply of labour for carrying out any work) undertaken by the contractor for the co-operative society."

13.1.2. Sections 200 and 201 of the Act, respectively dealing with the duty of the person deducting tax and consequences on failure to deduct or pay, as applicable at the relevant time,could also be reproduced as under:-

"200. Duty of person deducting tax.

(1) Any person deducting any sum in accordance with the foregoing provisions of this Chapter[9], shall pay within the prescribed time, the sum so deducted to the credit of the Central Government or as the Board directs.

[9] The words "the foregoing provisions of this Chapter" were substituted for the previous expressions carrying various provisions of the Act, by the Finance (No. 2) Act, 2004, w.e.f. 01.10.2004.

(2) Any person being an employer, referred to in sub-section (1A) of section 192 shall pay, within the prescribed time, the tax to the credit of the Central Government or as the Board directs.[10]

(3) Any person deducting any sum on or after the 1st day of April, 2005 in accordance with the foregoing provisions of this Chapter or, as the case may be, any person being an employer referred to in sub-section (1A) of section 192 shall, after paying the tax deducted to the credit of the Central Government within the prescribed time, prepare quarterly statements for the period ending on the 30th June, the 30th September, the 31st December and the 31st March in each financial year and deliver or cause to be delivered to the prescribed income-tax authority or the person authorised by such authority such statement in such form and verified in such manner and setting forth such particulars and within such time as may be prescribed.[11]

201. Consequences of failure to deduct or pay.

(1) If any such person referred to in section 200 and in the cases referred to in section 194, the principal officer and the company of which he is the principal officer does not deduct the whole or any part of the tax or after deducting fails to pay the tax as required by or under this Act, he or it shall, without prejudice to any other consequences which he or it may incur, be deemed to be an assessee in default in respect of the tax:

Providedthat no penalty shall be charged under section 221 from such person, principal officer or company unless the Assessing Officer is satisfied that such person or principal officer or company, as the case may be, has without good and sufficient reasons failed to deduct and pay the tax.

(1A) Without prejudice to the provisions of sub-section (1), if any such person, principal officer or company as is referred to in that sub-section does not deduct the whole or any part of the tax or after deducting fails to pay the tax as required by or under this Act, he or it shall be liable to pay simple interest at twelveper cent per annum on the amount of such tax from the date on which

[10] Sub-section (2) was inserted by the Finance Act, 2002.

[11] Sub-section (3) was inserted by the Finance (No.2) Act, 2004, w.e.f. 01.04.2005

such tax was deductible to the date on which such tax is actually paid.

(2) Where the tax has not been paid as aforesaid after it is deducted, the amount of the tax together with the amount of simple interest thereon referred to in sub-section (1A) shall be a charge upon all the assets of the person, or the company, as the case may be, referred to in sub-section (1)."

13.2. Chapter IV of the Act of 1961 deals with the subject "Computation of Total Income" and Section 40 occurs in Part D thereof, carrying the provisions relating to the "*Profits and Gains of Business or Profession*". Even when Sections 30 to 38 provide for various allowances and deductions in computation of the income from profits and gains of business or profession, Section 40 specifically ordains that certain amounts shall not be deducted, notwithstanding anything to the contrary contained in the said Sections 30 to 38 of the Act. In the present matter, we are concerned with the provisions contained in sub-clause (ia) of clause (a) of Section 40of the Act, which was inserted by the Finance (No. 2) Act, 2004 with effect from 01.04.2005. Hence, the extraction hereunder is essentially of the provision that could be read as Section 40(a)(ia) of the Act after insertion by the Finance (No. 2) Act, 2004: -

"40. Amounts not deductible. -Notwithstanding anything to the contrary in sections 30 to 38, the following amounts shall not be deducted in computing the income chargeable under the head "Profits and gains of business or profession",-

(a) in the case of any assessee-

*** *** ***

(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 which tax is deductible at source under Chapter XVII-B and such tax has not been deducted 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:

A 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.

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

(i) "commission or brokerage" shall have the same meaning as in clause (i) of the Explanation to section 194H;

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

(iii) "professional services" shall have the same meaning as in clause (a) of the Explanation to section 194J;

D (iv) "work" shall have the same meaning as in Explanation III to section 194C;

*** *** ***"[12]

13.3. Section 43 in the very same Part D of Chapter IV of the Act of 1961 defines various terms relevant to the income from profits E and gains of business or profession; and clause (2) thereof, carrying the definition of the expression "paid", having been referred in the present matter, could also be usefully reproduced as under:-

"**43.Definitions of certain terms relevant to income from profits and gains of business or profession. -**In sections 28 to F 41 and in thissection, unless the context otherwise requires-

*** *** ***

(2) "paid" means actually paid or incurred according to the method of accounting upon the basis of which the profits or gains are computed under the head "Profits and gains of business or G profession";

*** *** ***"

[12] We may usefully indicate that Section 40(a)(ia) of the Act has undergone several amendments from time to time and in one segment of arguments, the amendments as made in the years 2010 and 2014, have been referred on behalf of the appellant. We shall H refer to the relevant contents of this provision after such amendments while dealing with that part of arguments at the appropriate juncture hereafter later.

13.4. For their relevance in relation to another segment of arguments, we may also take note of the meaning assigned to the expression "assessment year" in clause (9) of Section 2; and to the expression "previous year" in Section 3 of the Act of 1961 as follows: -

"**2. Definitions.-**In this Act, unless the context otherwise requires,-

*** *** ***

(9) "assessment year" means the period of twelve months commencing on the 1st day of April every year;

*** *** ***"

"**3. "Previous year" defined.-** For the purposes of this Act, "previous year" means the financial year immediately preceding the assessment year:

*** *** ***"

14. We may now take up the questions involved in this matter *ad seriatim.*

Question No.1

15. In order to maintain that the appellant was under no obligation to make any deduction of tax at source, it has been argued that there was no oral or written contract of the appellant with the truck operators/ owners, whose vehicles were engaged to execute the work of transportation of the goodsonly on freelance and need basis. The submission has been that the question of TDS under Section 194C(2) would have arisen only if the payment was made to a "sub-contractor" and that too,in pursuance of a contract for the purpose of "carrying whole or any part of work undertaken by the contractor". In our view, the submissions so made remain entirely baseless.

15.1. The nature of contract entered into by the appellant with the consignor company makes it clear that the appellant was to transport the goods (cement) of the consignor company; and in order to execute this contract, the appellant hired the transport vehicles, namely, the trucks from different operators/owners. The appellant received freight charges from the consignor company, who indeed deducted tax at source while making such payment to the appellant. Thereafter, the appellant paid the charges to the persons whose vehicles were hired for the purpose of the

A said work of transportation of goods. Thus, the goods in question were transported through the trucks employed by the appellant but, there was no privity of contract between the truck operators/owners and the said consignor company. Indisputably, it was the responsibility of the appellant to transport the goods (cement) of the company; and how to accomplish this task of transportation was a matter exclusively within the domain of
B the appellant. Hence, hiring the services of truck operators/owners for this purposecould have only been under a contract between the appellant and the said truck operators/owners. Whether such a contract was reduced into writing or not carries hardly any relevance. In the given scenario and set up, the said truck operators/owners answered to the
C description of "sub-contractor" for carrying out the whole or part of the work undertaken by the contractor (i.e., the appellant) for the purpose of Section 194C(2) of the Act.

15.2. The suggestions on behalf of the appellant that the said truck operators/owners were not bound to supply the trucks as per the need
D of the appellant nor the freight payable to them was pre-determined, in our view, carry no meaning at all. Needless to observe that if a particular truck was not engaged, there existed no contract but, when any truck got engaged for the purpose of execution of the work undertaken by the appellant and freight charges were payable to its operator/owner upon
E execution of the work, i.e., transportation of the goods, all the essentials of making of a contract existed; and, as aforesaid, the said truck operator/ owner became a sub-contractor for the purpose of the work in question. The AO, CIT(A) and the ITAT have concurrently decided this issue against the appellant with reference to the facts of the case, particularly after appreciating the nature of contract of the appellant with the consignor
F company as also the nature of dealing of the appellant, while holding that the truck operators/owners were engaged by the appellant as sub-contractors. The same findings have been endorsed by the High Court in its short order dismissing the appeal of the appellant. We are unable to find anything of error or infirmity in these findings.

G 15.3. The decision of Delhi High Court in the case of ***Hardarshan Singh*** (supra), in our view, has no application whatsoever to the facts of the present case. The assessee therein, who was in the business of transporting goods, had four trucks of his own and was also acting as a commission agent by arranging for transportation through other transporters. As regards the income of assessee relatable to transportation
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through other transporters, it was found that the assessee had merely acted as a facilitator or as an intermediary between the two parties (i.e., the consignor company and the transporter) and had no privity of contract with either of such parties inasmuch as he only collected freight charges from the clients who intended to transport their goods through other transporters; and the amount thus collected from the clients was paid to those transporters by the assessee while deducting his commission. Looking to the nature of such dealings, the said assessee was held to be "not the person responsible" for making payments in terms of Section 194C of the Act and hence, having no obligation to deduct tax at source. In contradistinction to the said case of ***Hardarshan Singh***, the appellant of the present case was not acting as a facilitator or intermediary between the consignor company and the truck operators/owners because those two parties had no privity of contract between them. The contract of the company, for transportation of its goods, had only been with the appellant and it was the appellant who hired the services of the trucks. The payment made by the appellant to such a truck operator/owner was clearly a payment made to a sub-contractor.

15.4. Though the decision of this Court in the case of ***Palam Gas Service*** (supra) essentially relates to the interpretation of Section 40(a)(ia) of the Act and while the relevant aspects concerning the said provision shall be examined in the next question but, for the present purpose, the facts of that case could be usefully noticed, for being akin to the facts of the present case and being of apposite illustration. Therein, the assessee was engaged in the business of purchase and sale of LPG cylinders whose main contract for carriage of LPG cylinders was with Indian Oil Corporation, Baddi wherefor, the assessee received freight payments from the principal.The assessee got the transportation of LPG done through three persons to whom he made the freight payments. The Assessing Officer held that the assessee had entered into a sub-contract with the said three persons within the meaning of Section 194C of the Act. Such findings of AO were concurrently upheld upto the High Court and, after interpretation of Section 40(a)(ia), this Court also approved the decision of the High Court while dismissing the appeal with costs. Learned counsel for the appellant has made an attempt to distinguish the nature of contract in ***Palam Gas Service*** by suggesting that therein, the assessee's sub-contractors were specific and identified persons with whom the assessee had entered into contract whereas the present appellant was free to hire the service of any truck operator/owner and,

A in fact, the appellant hired the trucks only on need basis. In our view, such an attempt of differentiation is totally baseless and futile. Whether the appellant had specific and identified trucks on its rolls or had been picking them up on freelance basis, the legal effect on the status of parties had been the same that once a particular truck was engaged by the appellant on hire charges for carrying out the part of work undertaken by it (i.e., transportation of the goods of the company), the operator/ owner of that truck became the sub-contractor and all the requirements of Section 194C came into operation.

15.5. Thus, we have no hesitation in affirming the concurrent findings in regard to the applicability of Section 194C to the present case. Question No.1 is, therefore, answered in the negative; against the assessee-appellant and in favour of the revenue.

Question No.2.

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

16.1. Section 40(a)(ia) provides for the consequences of default in the case where tax is deductible at source on any interest, commission, brokerage or fees but had not been so deducted, or had not been paid after deduction (during the previous year or in the subsequent year before expiry of the prescribed time) in the manner that the amount of such interest, commission, brokerage or fees shall not be deducted in computing the income chargeable under "profits and gains of business or profession". In other words, it shall be computed as income of the assessee because of his default in not deducting the tax at source.

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

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

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

16.4. Taking up the question as to whether disallowance under Section 40(a)(ia) of the Act is confined to the amount "payable" and not

A to the amount "already paid", we find that these aspects of interpretation do not require much dilation in view of the ratio of the decision of this Court in the case of ***Palam Gas Service*** (supra).

16.5. In fact, the decision in ***Palam Gas Service***(supra) is a direct answer to all the contentions urged on behalf of the appellant in the B present case. In that case, this Court approved the views of Punjab and Haryana High Court in the case of ***P.M.S. Diesels and Ors. v. Commissioner of Income-Tax*****: (2015) 374 ITR 562**as regards mandatory nature of the provisions relating to the liability to deduct tax at source in the following words (at pp. 306-308 of ITR):-

C **"**11.The Punjab & Haryana High Court in *P.M.S. Diesels v. CIT* [2015] 374 ITR 562 (P&H), has held these provisions to be mandatory in nature with the following observations:

> "The liability to deduct tax at source under the provisions of Chapter XVII is mandatory. A person responsible for paying D any sum is also liable to deposit the amount in the Government account. All the sections in Chapter XVII-B require a person to deduct the tax at source at the rates specified therein. The requirement in each of the sections is preceded by the word 'shall'. The provisions are, therefore, mandatory. There is nothing in any of the sections that would warrant our reading E the word 'shall' as 'may'. The point of time at which the deduction is to be made also establishes that the provisions are mandatory. For instance, under section 194C, a person responsible for paying the sum is required to deduct the tax "at the time of credit of such sum to the account of the contractor F or at the time of the payment thereof. ....."'"

12. While holding the aforesaid view, the Punjab and Haryana High Court discussed the judgments of the Calcutta and Madras High Courts, which had taken the same view, and concurred with the same, which is clear from the following discussion contained G in the judgment of the Punjab and Haryana High Court:

> "A Division Bench of the Calcutta High Court in *CIT* v. *Crescent Export Syndicate*[2013] 216 Taxman 258 (Cal) held :
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> '*13*. …
>
> 'The term "shall" used in all these sections make it clear H that these are mandatory provisions and applicable to the

entire sum contemplated under the respective sections. These sections do not give any leverage to the assessee to make the payment without making TDS. On the contrary, the intention of the Legislature is evident from the fact that timing of deduction of tax is earliest possible opportunity to recover tax, either at the time of credit in the account of payee or at the time of payment to payee, whichever is earlier.'

Ms.Dhugga invited our attention to a judgment of the Division Bench of the Madras High Court in *Tube Investments of India Ltd.* v. *Asst. CIT (TDS)* [2010] 325 ITR 610 (Mad). The Division Bench referred to the statistics placed before it by the Department which disclosed that TDS collection had augmented the revenue. The gross collection of advance tax, surcharge, etc. was Rs 2,75,857.70 crores in the financial year 2008-09 of which the TDS component alone constituted Rs 1,30,470.80 crores. The Division Bench observed that introduction of section 40(a)(ia) had achieved the objective of augmenting the TDS to a substantial extent. The Division Bench also observed that when the provisions and procedures relating to TDS are scrupulously applied, it also ensured the identification of the payees thereby confirming the network of assessees and that once the assessees are identified it would enable the tax collection machinery to bring within its fold all such persons who are liable to come within the network of taxpayers. These objects also indicate the legislative intent that the requirement of deducting tax at source is mandatory.

The liability to deduct tax at source is, therefore, mandatory."

13. The aforesaid interpretation of sections 194C conjointly with section 200 and rule 30(2) is unblemished and without any iota of doubt. We, thus, give our imprimatur to the view taken….."

(emphasis in bold supplied)

16.5.1. Having said that deducting tax at source is obligatory, this Court proceeded to deal with the issue as to whether the word '*payable*' in Section 40(a)(ia) would cover only those cases where the amount is payable and not where it has actually been paid. This Court took note of

A the exhaustive interpretation of various aspects related with this issue by the Punjab and Haryana High Court in the case of ***P.M.S. Diesels*** (supra) as also by the Calcutta High Court in the case of ***Commissioner of Income-Tax, Kolkata-XI v. Crescent Export Syndicate:*** **(2013) 216 Taxman 258**; and while approving the same, this Court held, as regards implication and connotation of the expression "payable" used in this provision, as follows (at p. 310 of ITR):-

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> **"**15. We approve the aforesaid view as well. **As a fortiori, it follows that section 40(a)(ia) covers not only those cases where the amount is payable but also when it is paid.** In this behalf, one has to keep in mind the purpose with which section 40 was enacted and that has already been noted above. We have also to keep in mind the provisions of sections 194C and 200. Once it is found that the aforesaid sections mandate a person to deduct tax at source not only on the amounts payable but also when the sums are actually paid to the contractor, **any person who does not adhere to this statutory obligation has to suffer the consequences which are stipulated** in the Act itself. Certain consequences of failure to deduct tax at source from the payments made, where tax was to be deducted at source or failure to pay the same to the credit of the Central Government, are stipulated in section 201 of the Act. This section provides that in that contingency, such a person would be deemed to be an assessee in default in respect of such tax. While stipulating this consequence, section 201 categorically states that the aforesaid sections would be without prejudice to any other consequences which that defaulter may incur. Other consequences are provided under section 40(a)(ia) of the Act, namely, payments made by such a person to a contractor shall not be treated as deductible expenditure. When read in this context, it is clear that section 40(a)(ia) deals with the nature of default and the consequences thereof. Default is relatable to Chapter XVII-B (in the instant case sections 194C and 200, which provisions are in the aforesaid Chapter). **When the entire scheme of obligation to deduct the tax at source and paying it over to the Central Government is read holistically, it cannot be held that the word "payable" occurring in section 40(a)(ia) refers to only those cases where the amount is yet to be paid and does not cover the cases where the amount is actually paid.** If

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the provision is interpreted in the manner suggested by the appellant herein, then even when it is found that a person, like the appellant, has violated the provisions of Chapter XVII-B (or specifically sections 194C and 200 in the instant case), he would still go scot-free, without suffering the consequences of such monetary default in spite of specific provisions laying down these consequences…..."

(emphasis in bold supplied)

16.6. We may profitably observe that in the case of ***P.M.S. Diesels*** (supra), the Punjab and Haryana High Court had extensively dealt with myriad features of Section 40(a)(ia) of the Act, including the term "payable" used therein as also the proviso thereto; and expounded on the entire gamut of this provision while making reference to Finance (No. 2) Bill of 2004 introducing the provision and while also drawing support from the views expressed by Calcutta High Court in the case of ***Crescent Export Syndicate*** (supra). As regards the interpretation of the term "payable", it was observed in ***P.M.S. Diesels*** as under(at pp. 574-575 of ITR):-

"21. Section 40(a)(ia), therefore, applies not merely to assessees following the mercantile system but also to assessees following the cash system.

If this view is correct and indeed we must proceed on the footing that it is, it goes a long way in indicating the fallacy in the appellant's main contention, namely, if the payments have already been made by the assessee to the payee/contracting party, the provisions of section 40(a)(ia) would not be attracted even if the tax is not deducted and/or paid over to the Government account.

22. Section 40(a)(ia) refers to the nature of the default and the consequence of the default. The default is a failure to deduct the tax at source under Chapter XVII-B or after deduction the failure to pay over the same to the Government account. **The term "payable" only indicates the type or nature of the payments by the assessees to the persons/payees referred to in section 40(a)(ia), such as, contractors.** It is not in respect of every payment to a payee referred to in Chapter XVII-B that an assessee is bound to deduct tax. There may be payments to persons referred to in Chapter XVII-B, which do not attract the provisions of Chapter XVII-B. The consequences under section

A 40(a)(ia) would only operate on account of failure to deduct tax where the tax is liable to be deducted under the provisions of the Act and in particular Chapter XVII-B thereof. **It is in that sense that the term "payable" has been used. The term "payable" is descriptive of the payments which attract the liability to deduct tax at source. It does not categorize defaults on the basis of when the payments are made to the payees of such amounts which attract the liability to deduct tax at source.**"

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(emphasis in bold supplied)

16.7. We find the above-extracted observations and C reasonings,which have already been approved by this Court in ***Palam Gas Service*** (supra), to be precisely in accord with the scheme and purpose of Section 40(a)(ia) of the Act; and are in complete answer to the contentions urged by the learned counsel for the appellant.It is *ex facie* evident that the term "payable" has been used in Section 40(a)(ia) of the Act only to indicate the type or nature of the payments by the D assessees to the payees referred therein. In other words, the expression "payable" is descriptive of the payments which attract the liability for deducting tax at source and it has not been used in the provision in question to specify any particular class of default on the basis as to whether payment has been made or not. The semantical suggestion by E the learned counsel for the appellant, that this expression "payable" be read in contradistinction to the expression "paid",sans merit and could only be rejected.In a nutshell, while respectfully following ***Palam Gas Service*** (supra), we could only iterate our approval to the interpretation by the Punjab and Haryana High Court in ***P.M.S. Diesels*** (supra).

F 16.8. Faced with the position that declaration of law in ***Palam Gas Service*** (supra) practically covers this matter, learned counsel for the appellant has endeavoured to submit that the decision in ***Palam Gas Service***, requires reconsideration for the reason that certain aspects of law have not been considered thereinand correct principles of interpretation have not been applied. We are unable to find substance in G any of these contentions.The decision of Co-ordinate Bench in ***Palam Gas Service*** (supra) on the core question of law is equally binding on this Bench and could be doubted only if the view, as taken, is shown to be not in conformity with any binding decision of the Larger Bench or any statutory provisions or any other reason of the like nature. We find H none. In fact, a close look at the decision of ***P.M.S. Diesels*** (supra),

which has been totally approved by this Court in ***Palam Gas Service***, makes it clear that therein, every aspect of the matter, from a wide range of angles, was examined by the Punjab and Haryana High Court while drawing support from the decisions of other High Courts, particularly that of the Calcutta High Court in the case of ***Crescent Export Syndicate*** (supra).

16.9. We are in respectful agreement with the observations in ***Palam Gas Service*** that the enunciations in ***P.M.S. Diesels*** had been of correct interpretation of the provisions contained in Section 40(a)(ia) of the Act. The decision in ***Palam Gas Service*** covers the entire matter and the said decision, in our view, does not require any reconsideration.That being the position, the contention urged on behalf of the appellant that disallowance under Section 40(a)(ia) does not relate to the amount already paid stands rejected.

16.10. Another contention in regard to Section 40(a)(ia) of the Act, that its scope cannot be decided on the basis of Section 194C, has only been noted to be rejected. The interplay of these provisions is not far to seek where Section 40(a)(ia) is not a stand-alone provision but provides one of those additional consequences as indicated in Section 201 of the Act for default by a person in compliance of the requirements of the provisions contained in Part B of Chapter XVII of the Act. The scheme of these provisions makes it clear that the default in compliance of the requirements of the provisions contained in Part B of Chapter XVII of the Act (that carries Sections 194C, 200 and 201) leads, *inter alia*, to the consequence of Section 40(a)(ia) of the Act. Hence,the contours of Section 40(a)(ia) of the Act could be aptly defined only with reference to the requirements of the provisions contained in Part B of Chapter XVII of the Act, including Sections 194C, 200 and 201. Putting it differently, when the obligation of Section 194C of the Act is the foundation of the consequence provided by Section 40(a)(ia) of the Act, reference to the former is inevitable in interpretation of the latter.

16.11. In view of the above, reference to the definition of the term "paid" in Section 43(2) of the Act is of no assistance to the appellant. Similarly, the observations in the case of ***J.K. Synthetics*** (supra), as regards the difference in connotation of the expressions "payable" and "paid", in the context of liability to pay interest on the tax payable under the Rajasthan Sales Tax Act, 1954, has no co-relation whatsoever to the present case. Further, when it is found that the process of interpretation

of Section 40(a)(ia) of the Act in ***P.M.S. Diesels*** (supra), as approved by this Court in ***Palam Gas Service*** (supra), had been with due application of the relevant principles, reference to the decision in the case of ***Institute of Chartered Accountants of India*** (supra), on the general principles of interpretation, does not advance the case of the appellant in any manner.

16.12. In view of the above, Question No.2 is also answered in the negative; against the assessee-appellant and in favour of the revenue.

Question No.3

17. Quite conscious of the position that the decision of this Court in ***Palam Gas Service*** (supra) practically covers the substance of present matter against the assessee, learned counsel for the assessee-appellant has made a few alternative attempts to argue against the disallowance in question.

17.1. The learned counsel would submit that the said sub-clause (ia), having been inserted to clause (a) of Section 40 of the Act with effect from 01.04.2005 by Finance (No.2) Act, 2004, would apply only from the financial year 2005-2006 and hence, cannot apply to the present case pertaining to the financial year 2004-2005. The learned counsel, of course, drew support to this contention from the decision of Calcutta High Court in the case of ***PIU Ghosh*** (supra).

17.1.1. Before proceeding further, it appears apposite to observe, as indicated in paragraph 7.3 hereinbefore, that in the copy of order passed by ITAT in this case, there is obvious typographical error on the date of coming into force of the amendment toSection 40 of the Act of 1961 by the Finance (No.2) Act, 2004 inasmuch as the said amendment was made applicable with effect from 01.04.2005 and not 01.04.2004, as appearing the copy of the order of ITAT. However, this error is not of material bearing because the amendment in question was applicable from and for the assessment year 2005-2006, for the reasons occurring *infra*.

17.2. Reverting to the contentions urged in this case, there is no doubt that in ***PIU Ghosh*** (supra), the Calcutta High Court, indeed, took the view which the learned counsel for the appellant has canvassed before us. The Calcutta High Court observed that the said Finance (No.2) Act, 2004 got presidential assent on 10.09.2004 and it was provided that the provision in question shall stand inserted with effect from 01.04.2005. According to the Calcutta High Court, the assessee could not have

foreseen prior to 10.09.2004 that any amount paid to a contractor without deducting tax at source was likely to become not deductible in computation of income under Section 40 and that the legislature, being conscious of the likely predicament, provided that the provision shall become operative from 01.04.2005. The High Court further proceeded to observe that any other interpretation would amount to punishing the assessee for no fault of his. The High Court further observed that Section 11 of the said Finance Act, inserting sub-clause (ia), did not provide that the same was to become effective from the assessment year 2005-2006. We may usefully reproduce the opinion of the Calcutta High Court in the case of ***PIU Ghosh***, as under (at p. 326 of ITR):-

> "9. Admittedly, the Finance Act, 2004 got presidential assent on September 10, 2004. The assessee could not have foreseen prior to September 10, 2004 that any amount paid to a contractor without deducting tax at source was likely to become not deductible under section 40. It is difficult to assume that the Legislature was not aware or did not foresee the aforesaid predicament. The Legislature therefore provided that the Act shall become operative on April 1, 2005. Any other interpretation shall amount to "punishing the assessee for no fault of his" following the judgment in the case of *Hindustan Electro Graphites Ltd.* (supra).
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> 10. On top of that, section 4 relied upon by Mr. Agarwal merely provides for an enactment as regards rate of tax to be charged in any particular assessment year which has no application to the case before us. Section 11 of the Finance (No. 2) Act, 2004 by which sub-clause (ia) was added to section 40(a) of the Income-tax Act does not provide that the same was to become effective from the assessment year 2005-06. It merely says it shall become effective on April 1, 2005 which for reasons already discussed should mean to refer to the financial year. There is, as such, no scope for any ambiguity nor is there any scope for confusion….."

17.3. Learned counsel for the appellant has submitted that the revenue has accepted the said decision and has not filed any appeal against the same. It appears, however, that the amount of deduction in the said case was only a sum of Rs. 4,30,386/- and obviously, the net tax effect in that case, decided on 12.07.2016, was on the lower side. In any case, the said decision cannot be treated as final declaration of law on the subject merely because the same has not been appealed against.

A Having examined the law applicable, with respect, we find it difficult to approve the above-quoted opinion of the Calcutta High Court, particularly when it does not appear standing in conformity with the scheme of assessment of income tax under the Act of 1961 and where the High Court seems to have not noticed the proviso to clause (ia) of Section 40(a) of the Act forming the part of the amendment in question.

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17.4. It needs hardly any detailed discussion thatin income tax matters, the law to be applied is that in force in the assessment year in question, unless stated otherwise by express intendment or by necessary implication. As per Section 4 of the Act of 1961, the charge of income tax is with reference to any assessment year, at such rate or rates as provided in any central enactment for the purpose, in respect of the total income of the previous year of any person. The expression "previous year" is defined in Section 3 of the Act to mean '*the financial year immediately preceding the assessment year*'; and the expression "assessment year" is defined in clause (9) of Section 2 of the Act to mean '*the period of twelve months commencing on the 1st day of April every year*'.

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17.5. In the case of ***Commissioner of Income-Tax, West Bengal v. Isthmian Steamship Lines*****: (1951) 20 ITR 572**, a 3-Judge Bench of this Court exposited on the fundamental principle that *'in income-tax matters the law to be applied is the law in force in the assessment year unless otherwise stated or implied.'* This decision and various other decisions were considered by the Constitution Bench of this Court in the case of ***Karimtharuvi Tea Estate Ltd. v. State of Kerala*****: (1966) 60 ITR 262** and the principles were laid down in the following terms(at pp. 264-266 of ITR):-

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"Now, **it is well-settled that the Income-tax Act, as it stands amended on the first day of April of any financial year must apply to the assessments of that year. Any amendments in the Act which come into force after the first day of April of a financial year, would not apply to the assessment for that year,** even if the assessment is actually made after the amendments come into force.

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The High Court has, however relied upon a decision of this court in *Commissioner of Income-tax v. Isthmian Steamship Lines,* where it was held as follows :

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"It will be observed that we are here concerned with two datum lines : (1) the 1st of April, 1940, when the Act came into force, and (2) the 1st of April, 1939, which is the date mentioned in the amended proviso. The first question to be answered is whether these dates are to apply to the accounting year or the year of assessment. They must be held to apply to the assessment year, because in income-tax matters the law to be applied is the law in force in the assessment year unless otherwise stated or implied. The first datum line therefore affected only the assessment year of 1940-41, because the amendment did not come into force till the 1st of April 1940. That means that the old law applied to every assessment year up to and including the assessment year 1939-40."

This decision is authority for the proposition that though the subject of the charge is the income of the previous year, the law to be applied is that in force in the assessment year, unless otherwise stated or implied. The facts of the said decision are different and distinguishable and the High Court was clearly in error in applying that decision to the facts of the present case."

(emphasis in bold supplied)

17.6. We need not multiply on the case law on the subject as the principles aforesaid remainsettled and unquestionable. Applying these principles to the case at hand, we are clearly of the view thatthe provision in question, having come into effect from 01.04.2005, would apply from and for the assessment year 2005-2006 andwould be applicable for the assessment in question. Putting it differently, the legislature consciously made the said sub-clause (ia) of Section 40(a) of the Act effective from 01.04.2005, meaning thereby that the same was to be applicable from and for the assessment year 2005-2006; and neither there had been express intendment nor any implication that it would apply only from the financial year 2005-2006.

17.7. The observations of Calcutta High Court in the case of ***PIU Ghosh*** (supra) as regards the likely prejudice to an assessee in relation to the financial year 2004-2005, in our view, do not relate to any legal grievance or legal prejudice. The requirement of deducting tax at source was already existing as per Section 194C of the Act and it was the bounden duty of the appellant to make such deduction of TDS and to

A make over the same to the revenue. Section 201 was also in existence which made it clear that default in making deduction in accordance with the provisions of the Act would make the appellant "an assessee in default". The appellant cannot suggest that even if the obligation of TDS on the payments made by him was existing by virtue of Section 194C(2), he would have honoured such an obligation only if being aware of the drastic consequence of default that such payment shall not be deducted for the purpose of drawing up the assessment.

17.7.1. Apart from the above, significant it is to notice that by the amendment in question, clause (ia) was added to Section 40(a) of the Act with a proviso to the effect that where, in respect of the sum referable to TDS requirement, tax has been deducted in any subsequent year, or has been deducted during the previous year but paid in any subsequent year after expiry of the time prescribed in Section 200(1),such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid. The proviso effectively took care of the case of any bonafide assessee who would earnestly comply with the requirement of deducting the tax at source. It is evident that the said proviso has totally escaped the attention of Calcutta High Court in the case of ***PIU Ghosh*** (supra). In fact, the relaxation by way of the proviso/s to Section 40(a)(ia) of the Act had further been modulated by way of various subsequent amendments to further mitigate the hardships of bonafide assessees, as noticed hereafter later. Suffice it to observe for the present purpose that the said decision in ***PIU Ghosh*** cannot be regarded as correct on law.

17.8. In fact, if the contention of learned counsel for the appellant read with the proposition in ***PIU Ghosh*** (supra) is accepted and the said sub-clause (ia) of Section 40(a) of the Act is held applicable only from the financial year 2005-2006, the result would be that this provision would apply only from the assessment year 2006-2007. Such a result is neither envisaged nor could be countenanced. Hence, the contention that sub-clause (ia),of clause (a) of Section 40 of the Act would apply only from the financial year 2005-2006 and cannot apply to the present case pertaining to the financial year 2004-2005 stands rejected.

18. The supplemental submission that in any case, disallowance cannot be applied to the payments already made prior to 10.09.2004, the date on which the Finance (No.2) Act, 2004 received the assent of the President of India, remains equally baseless. The said date of assent of

the President of India to Finance (No.2) Act, 2004 is not the date of applicability of the provision in question, for the specific date having been provided as 01.04.2005. Of course, the said date relates to the assessment year commencing from 01.04.2005 (i.e., assessment year 2005-2006).

18.1. Even if it be assumed, going by the suggestions of the appellant, that the requirements of Section 40(a)(ia) became known on 10.09.2004, the appellant could have taken all the requisite steps to make deductions or, in any case, to make payment of the TDS amount to the revenue during the same financial year or even in the subsequent year, as per the relaxation available in the proviso to Section 40(a)(ia) of the Act but, the appellant simply avoided his obligation and attempted to suggest that it had no liability to deduct the tax at source at all.Such an approach of the appellant, when standing at conflict with law, the consequence of disallowance under Section 40(a)(ia) of the Act remains inevitable.

19. In yet another alternative attempt, learned counsel for the appellant has argued that by way of Finance (No.2) Act, 2014, disallowance under Section 40(a)(ia) has been limited to 30% of the sum payable and the said amendment deserves to be held retrospective in operation. This line of argument has beengrafted with reference to the decision in ***Calcutta Export Company*** (supra) wherein, another amendment of Section 40(a)(ia) by the Finance Act of 2010 was held by this Court to be retrospective in operation. The submission so made is not only baseless but is bereft of any logic. Neither the amendment made by the Finance (No.2) Act, 2014 could be stretched anterior the date of its substitution so as to reach the assessment year 2005-2006 nor the said decision in ***Calcutta Export Company*** has any correlation with the case at hand or with the amendment made by the Finance (No.2) Act of 2014.

19.1. By the amendment brought about in the year 2014, the legislature reduced the extent of disallowance under Section 40(a)(ia) of the Actand limited it to 30% of the sum payable. On the other hand, by the Finance Act of 2010, which was considered in the case of ***Calcutta Export Company*** (supra), the proviso to Section 40(a)(ia) of the Act was amended so as to provide relief to a bonafide assessee who could not make deposit of deducted tax within prescribed time. In fact, even before the year 2010, the said proviso was amended by the Finance Act

2008 and that amendment of the year 2008 was provided retrospective operation by the legislature itself. For ready reference, we may reproduce in juxtaposition the main part of Section 40(a)(ia) of the Actas it would read after the amendments of 2008, 2010 and 2014 respectively, as under[13]:-

(i) <u>After the amendment by Finance Act, 2008</u>

"40. Amounts not deductible. -Notwithstanding anything to the contrary in sections 30 to 38, the following amounts shall not be deducted in computing the income chargeable under the head "Profits and gains of business or profession",-

(a) in the case of any assessee-

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(ia) any interest, commission or brokerage, rent, royalty[14], fees for professional services or fees for technical services payable to a resident, or amounts payable to a contractor or sub-contractor, being resident, for carrying out any work (including supply of labour for carrying out any work), on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or, after deduction, has not been paid,-

(A) in a case where the tax was deductible and was so deducted during the last month of the previous year, on or before the due date specified in sub-section (1) of section 139; or

(B) in any other case, on or before the last day of the previous year:

Provided that where in respect of any such sum, tax has been deducted in any subsequent year or, has been deducted –

(A) during the last month of the previous year but paid after the said due date; or

(B) during any other month of the previous year but paid after the end of the said previous year,

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[13] The *Explanation* part of the provision is omitted, for being not relevant for the present purpose.

[14] The expressions "rent, royalty" were inserted in the year 2006.

such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid.

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(ii) <u>After the amendment by Finance Act, 2010</u>

"40. Amounts not deductible. -Notwithstanding anything to the contrary in sections 30 to 38, the following amounts shall not be deducted in computing the income chargeable under the head "Profits and gains of business or profession",-

(a) in the case of any assessee-

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(ia) any interest, commission or brokerage, rent, royalty,fees for professional services or fees for technical services payable to a resident, or amounts payable to a contractor or sub-contractor, being resident, for carrying out any work (including supply of labour for carrying out any work), on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or, after deduction, has not been paid on or before the due date specified in sub-section (1) of section 139:

Provided that where in respect of any such sum, tax has been deducted in any subsequent year, or has been deducted during the previous year but paid after the due date specified in sub-section (1) of section 139, such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid:

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(iii) <u>After the amendment by Finance (No.2) Act, 2014</u>

"40. Amounts not deductible. -Notwithstanding anything to the contrary in sections 30 to 38, the following amounts shall not be deducted in computing the income chargeable under the head "Profits and gains of business or profession",-

(a) in the case of any assessee-

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A (ia) thirty per cent. of any sum payable to a resident, on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or, after deduction, has not been paid on or before the due date specified in sub-section (1) of section 139:

Provided that where in respect of any such sum, tax has been
B deducted in any subsequent year, or has been deducted during the previous year but paid after the due date specified in sub-section (1) of section 139, thirty per cent. of such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid[15]:

C Provided further that where an assessee fails to deduct the whole or any part of the tax in accordance with the provisions of Chapter XVII-B on any such sum but is not deemed to be an assessee in default under the first proviso to sub-section (1) of section 201, then, for the purpose of this sub-clause, it shall be deemed that the assessee has deducted and paid the tax on such sum on the
D date of furnishing of return of income by the resident payee referred to in the said proviso.[16]

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19.2. The aforesaid amendment by the Finance (No.2) Act of
E 2014 was specifically made applicable w.e.f. 01.04.2015 and clearly represents the will of the legislature as to what is to be deducted or what percentage of deduction is not to be allowed for a particular eventuality, from the assessment year 2015-2016.

19.3. On the other hand, in the case of ***Calcutta Export Company*** (supra), this Court noticed the aforesaid two amendments to Section
F 40(a)(ia) of the Act by the Finance Act, 2008 and by the Finance Act, 2010, which were intended to deal with procedural hardship likely to be faced by the bonafide tax payer, who had deducted tax at source but could not make deposit within the prescribed time so as to claim deduction. In paragraph 17 of judgment in ***Calcutta Export Company***, this Court
G took note of the case of genuine hardship, particularly of the assessees who had deducted tax at source in the last month of previous year; and observed in paragraph 18 that the said amendment of the year 2008 was

[15] This proviso was substituted in the year 2008 and again in the year 2010; and then, was amended by the Finance (No. 2) Act, 2014.

H [16] This proviso was inserted by Act No. 23 of 2012.

brought about with a view to mitigate such hardship. After reproducing the said amendment of the year 2008 and after noticing its retrospective operation, this Court delved into the position obtaining after 2008, where still remained one class of assessees who could not claim deduction for the TDS amount in the previous year in which the tax was deducted and who could claim benefit of such deduction in the next year only; and, after finding that the amendment of the year 2010 was intended to remedy this position, held that the said amendment, being curative in nature, is required to be given retrospective operation that is, from the date of insertion of Section 40(a)(ia).

19.4. Learned counsel for the appellant has only referred to the concluding part of the decision in ***Calcutta Export Company*** but, a look at the entire synthesis by this Court, of the reasons for the amendments of 2008 and 2010, makes it clear as to why this Court held that the amendment of the year 2010 would be retrospective in operation.We may usefully reproduce the relevant discussion and exposition of this Court in ***Calcutta Export Company*** as under:-(at pp. 663-666 of ITR):-

> "19. The above amendments made by the Finance Act, 2008 thus provided that no disallowance under section 40(a)(ia) of the Income-tax Act shall be made in respect of the expenditure incurred in the month of March if the tax deducted at source on such expenditure has been paid before the due date of filing of the return. It is important to mention here that the amendment was given retrospective operation from the date of April 1,2005, i.e., from the very date of substitution of the provision.
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> 20. Therefore, the assesses were, after the said amendment in 2008, classified in two categories namely: one, those who have deducted that tax during the last month of the previous year and two, those who have deducted the tax in the remaining eleven months of the previous year. It was provided that in the case of assessees falling under the first category, no disallowance under section 40(a)(ia) of the Income-tax Act shall be made if the tax deducted by them during the last month of the previous year has been paid on or before the last day of filing of return in accordance with the provisions of section 139(1) of the Income-tax Act for the said previous year. In case, the assessees are falling under the second category, no disallowance under section 40(a)(ia) of

A Income-tax Act where the tax was deducted before the last month of the previous year and the same was credited to the Government before the expiry of the previous year. The net effect is that the assessee could not claim deduction for the TDS amount in the previous year in which the tax was deducted and the benefit of such deductions can be claimed in the next year only.

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21. The amendment though has addressed the concerns of the assesses falling in the first category but with regard to the case falling in the second category, it was still resulting into unintended consequences and causing grave and genuine hardships to the assesses who had substantially complied with the relevant TDS provisions by deducting the tax at source and by paying the same to the credit of the Government before the due date of filing of their returns under section 139(1) of the Income-tax Act. The disability to claim deductions on account of such lately credited sum of TDS in assessment of the previous year in which it was deducted, was detrimental to the small traders who may not be in a position to bear the burden of such disallowance in the present assessment year.

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22. In order to remedy this position and to remove hardships which were being caused to the assessees belonging to such second category, amendments have been made in the provisions of section 40(a) (ia) by the Finance Act, 2010.

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24. Thus, the Finance Act, 2010 further relaxed the rigors of section 40(a)(ia) of the Income-tax Act to provide that all TDS made during the previous year can be deposited with the Government by the due date of filing the return of income. The idea was to allow additional time to the deductors to deposit the TDS so made. However, the Memorandum Explaining the Provisions of the Finance Bill, 2010 expressly mentioned as follows: "This amendment is proposed to take effect retrospectively from April 1, 2010 and will, accordingly, apply in relation to the assessment year 2010-11 and subsequent years."

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25. The controversy surrounding the above amendment was whether the amendment being curative in nature should be applied

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retrospectively, i.e., from the date of insertion of the provisions of section 40(a)(ia) or to be applicable from the date of enforcement.

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27. A proviso which is inserted to remedy unintended consequences and to make the provision workable, a proviso which supplies an obvious omission in the section, is required to be read into the section to give the section a reasonable interpretation and requires to be treated as retrospective in operation so that a reasonable interpretation can be given to the section as a whole.

28. The purpose of the amendment made by the Finance Act, 2010 is to solve the anomalies that the insertion of section 40(a)(ia) was causing to the bona fide tax payer. The amendment, even if not given operation retrospectively, may not materially be of consequence to the Revenue when the tax rates are stable and uniform or in cases of big assessees having substantial turnover and equally huge expenses and necessary cushion to absorb the effect. However, marginal and medium taxpayers, who work at low gross product rate and when expenditure which becomes the subject matter of an order under section 40(a)(ia) is substantial, can suffer severe adverse consequences if the amendment made in 2010 is not given retrospective operation, i.e., from the date of substitution of the provision. Transferring or shifting expenses to a subsequent year, in such cases, will not wipe out the adverse effect and the financial stress. Such could not be the intention of the Legislature. Hence, the amendment made by the Finance Act, 2010 being curative in nature is required to be given retrospective operation, i.e., from the date of insertion of the said provision."

19.5. A bare look at the extraction aforesaid makes it clear that what this Court has held as regards "retrospective operation" is that the amendment of the year 2010,being curative in nature, would be applicable from the date of insertion of the provision in question i.e., sub-clause (ia) of Section 40(a) of the Act. This being the position, it is difficult to find any substance in the argument that the principles adopted by this Court in the case of ***Calcutta ExportCompany*** (supra) dealing with curative amendment, relating more to the procedural aspects concerning deposit of the deducted TDS, be applied to the amendment of the substantive provision by the Finance (No.2) Act, 2014.

19.6. We may in the passing observe that the assessee-appellant was either labouring under the mistaken impression that he was not required to deduct TDS or under the mistaken belief that the methodology of splitting a single payment into parts below Rs. 20,000/- would provide him escape from the rigour of the provisions of the Act providing for disallowance. In either event, the appellant had not been a bonafide assessee who had made the deduction and deposited it subsequently. Obviously, the appellant could not have derived the benefits that were otherwise available by the curative amendments of 2008 and 2010. Having defaulted at every stage, the attempt on the part of assessee-appellant to seek some succor in the amendment of Section 40(a)(ia) of the Act by the Finance (No.2) Act, 2014 could only be rejected as entirely baseless, rather preposterous.

19.7. Hence, Question No.3 is also answered in the negative, i.e., against the assessee-appellant and in favour of the revenue.

Question No. 4

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 summarisethe answers to Question Nos. 1 to 3 thatthe 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 961 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 fromthe 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)[17] 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 sourceand 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.

Kalpana K. Tripathy Appeal dismissed.

[17] Section 40A(3) envisaged at the relevant time that twenty percent of the expenditure exceeding twenty thousand rupees, of which payment was made otherwise than by a crossed cheque or bank draft, shall not be allowed as a deduction.