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IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI SPECIAL BENCH "B", MUMBAI

Before Shri R.S.Syal, A.M., Shri D.K.Agarwal, JM and Shri Rajendra Singh, A.M.

ITA No.2404/Mum/2009 :Asst.Year 2005-2006

M/s.Bharati Shipyard Limited 302 Wakefield House, 3rd Floor Sport Road, Ballard Estate Mumbai – 400 038. **PAN :AAACB1688E.**	Vs.	The Dy.Commissioner of Income-tax Circle 3(1) Mumbai.
(Appellant)		(Respondent)

Appellant by : Shri Vijay Mehta
Respondent by : Shri Pradeep Sharma

Date of Hearing :25.08.2011		**Date of Pronouncement :09.09.2011**

ORDER

Per R.S.Syal, AM :

The Hon'ble President of the Income Tax Appellate Tribunal, on a reference made by a Division Bench, has constituted this Special Bench by posting the following question for our consideration and decision:-

> *"Whether on the facts and in the circumstances of the case, the amendment brought out by the Finance Act, 2010 to section 40(a)(ia) w.e.f. 01.04.2010, is remedial and curative in nature and is, therefore, retrospective in nature."*

2. Ground no. 2 of this appeal by the assessee arising out of the order passed by the CIT(A) on 15.01.2001 in relation to the A.Y. 2005-06 is against the confirmation of disallowance of Rs.2,31,820 made by the Assessing Officer on account of delayed payment of ESI & PF dues.

3. After considering the rival submissions and perusing the relevant material on record we find that the said contribution received from the employees has been admittedly deposited after the due date under the respective Act but before the

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close of the previous year relevant to the assessment year under consideration. The Hon'ble Madras High Court in *CIT Vs. Shri Ganapathy Mills Company Limited [(2000) 243 ITR 879 (Mad.)]* has held that no disallowance can be made where the contribution is deposited late but within the grace period. In most of the cases the deposit has been made with in the grace period. The Hon'ble Delhi High Court in *CIT VS. Aimil Ltd. & Ors. [(2010) 321 ITR 508 (Del)]* has held that if the employees' share of contribution is paid before the due date of filing the return u/s 139(1) of the Income-tax Act, 1961 (hereinafter called the Act), then no disallowance can be made. In view of the foregoing facts it is clear that the assessee deserves and is hereby allowed relief on this issue in the light of the above precedents. This ground is allowed.

4. Ground no. 4 about the confirmation of disallowance of Rs.1,55,161 made by the A.O. u/s 14A of the Act was not pressed by the learned A.R. The same is, therefore, dismissed.

5. Ground no. 5 about the levy of interest u/s 234A, 234B and 234C is consequential and accordingly disposed off.

6. Ground no. 3 is against the confirmation of disallowance of Rs.50,12,311 made by the Assessing Officer u/s 40(a)(ia) of the Act. This ground forms the subject matter of the question extracted above placed before the Special Bench for contemplation and decision. Briefly stated the facts apropos this issue are that the assessee is a company engaged in the business of manufacturing of medium sized ships, barges, tugs etc. A note to the computation of income was attached by the assessee stating that the provisions of section 40(a)(ia) are directory and not mandatory. The AO noted that the assessee failed to deposit tax deducted at source within the specified time. On being show caused, it was stated that the amount of tax deducted at source was paid before the filing of return of income u/s 139(1) of the Act and hence no disallowance of expenses was called for u/s 40(a)(ia). Not

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convinced, the Assessing Officer made addition u/s 40(a)(ia). The assessee was partly successful before the learned CIT(A). The ld. DR has not brought to our notice any appeal filed by the Revenue against the relief allowed in the first appeal. It shows that the impugned order has been accepted by the Revenue. In the present appeal by the assessee we are concerned with the confirmation of disallowance of Rs.50,12,311 which consists of two amounts. First is the professional fee of Rs. 4,228 which was credited/paid by the assessee up to 28.02.2005 and the amount of tax deducted at source was paid on 8th April, 2005 as against due date of payment of 7th March, 2005. Second item is the amount paid to contractors totaling to Rs.50,08,083 up to 28.02.2005 on which tax deducted at source was actually paid on 23rd June, 2005 as against the due date of payment on 7th March, 2005.

7. We have heard the rival submissions and perused the relevant material on record in the light of precedents cited before us. The question for our consideration is as to whether section 40(a)(ia) amended by the Finance Act, 2010 with effect from 01.04.2010 is retrospective from 01.04.2005 or prospective from the date specified. Unless stated otherwise, the provisions of the Finance Act, 2010 would have applied w.e.f. 01.04.2011 i.e. A.Y. 2011-12. The provision in question has been specifically given retrospective effect from A.Y. 2010-11. Now the case of the assessee is that the amendment made by the Finance Act, 2010 should be given retrospective effect from 01.04.2005, being the date from which sub-clause (ia) of section 40(a) was inserted by the Finance (No. 2) Act, 2004. In order to find answer to this question it would be relevant to note down the legislative history of the provision.

8. Section 40 has certain clauses providing for the amounts which are not deductible. Sub-clause (ia) of clause (a) of section 40 was inserted by the Finance (No.2) Act, 2004 with effect from 1st April, 2005 reading as under:-

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

…..

(ia) any interest, commission or brokerage, fees for professional services or fees for technical services payable to a resident, or amounts payable to a contractor or sub-contractor, being resident, for carrying out any work (including supply of labour for carrying out any work), on or, after deduction, has not been paid during the previous year, or in the subsequent year before the expiry of the time prescribed under sub-section (1) of section 200 :

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

Explanation. – 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;

(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;

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

………"

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

"With a view to ***augment compliance of TDS provisions****, it is proposed to extend the provisions of section 40(a)(i) to payments of interest, commission or brokerage, fees for professional services or*

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

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

(emphasis supplied by us)

10. At this juncture it would be relevant to note that clause (a) of section 40 provides that in the case of any assessee (i) any interest, royalty, fees for technical services or other sum chargeable under this Act, which is **payable outside India; or in India to a non-resident, not being a company or to a foreign company** 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, shall not be allowed as deduction. There is a proviso to sub-clause (i) which provides 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 a subsequent year after the expiry of the time prescribed u/s 200(1), such sum shall be allowed as deduction in computing the income of the previous year in which such tax has been paid. Sub-clause (i) of section 40(a) is there in the Income-tax Act, 1961 since inception. Alike provision was there in the 1922 Act also as a portion of proviso to section 10(2)(iii). The effect of sub-clause (i) of section 40(a) is that the amount in the nature of items specified in this provision which is payable outside India or in India to a non-resident etc. on which tax is deductible, it is necessary that such tax must be deducted and paid after deduction during the

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previous year or before the expiry of time u/s 200(1). If such tax is not so paid, the expenditure referred to in the sub-clause shall not be allowed as deduction. Proviso to this provision provides that where such tax has been deducted in subsequent year or deducted in the previous year but paid in any subsequent year after the expiry of time u/s 200(1), such sum shall be allowed as deduction in computing the income of the previous year in which tax has been paid. Thus the strictness of the main provision of section 40(a)(i) providing for disallowance of expenditure in the year of its spending stands softened by the proviso in granting allowance of such expenditure in the year of payment of due tax. It is evident that the operation of this provision is restricted on the payment made outside India or to a non-resident in India etc.

11. It can be seen that the Finance (No.2) Act, 2004 extended the scope of section 40(a)(i) by way of insertion of sub-clause (ia). Whereas sub-clause (i) deals with the disallowance of expenses paid to non-residents etc. on the failure to deduct or deposit after deduction of tax during the previous year or in the subsequent year before the expiry of time prescribed under section 200(1), sub-clause (ia) extended the application of the same provision to the payments made to residents within the same time frame. The remedy for granting deduction in the subsequent year on payment, through proviso, in both the provisions is also similar. In nutshell, the insertion of sub-clause (ia) is nothing but expansion of the existing sub-clause (i) to the residents.

12. The Taxation Laws (Amendment) Act, 2006 widened the scope of this provision with effect from 1st day of April, 2006 with which we are not concerned in the instant appeal.

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

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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 paid,-
>
> *(A) in a case where the tax was deductible and was so deducted during the last month of the previous year, on or before the due date specified in sub-section (1) of section 139 ; or*
> *(B) in any other case, on or before the last day of the previous year.*
>
> *Provided that where in respect of any such sum, tax has been deducted in any subsequent year, or has been deducted-*
> *(A) during the last month of the previous year but paid after the said due date ; or*
> *(B) during any other month of the previous year but paid after the end of the said previous year,*
>
> *such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid." ;*

14. Here it is important to note that Chapter IV-D deals with the income under the head `Profits and gains of business or profession'. Section 28 contains a list of items of income which shall be chargeable to income-tax under this head. Section 29 is computing provision which provides that income referred to in section 28 shall be computed in accordance with the provisions contained in sections 30 to 43D. Sections 30 to 37 grant various deductions on account of expenses / allowances etc. Section 38 restricts the amount of depreciation allowance u/s 32. Then comes section 40 with the marginal note "Amounts not deductible". It starts with the non-obstante clause by providing that notwithstanding anything to the contrary in sections 30 to 38, the amounts specified in this section shall not be deducted in computing the income chargeable under the head "Profits and gains of business or profession". Thus it is vivid that section 40 has overriding effect over sections 30 to 38. In other words if any expenditure or allowance is deductible as

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per the provisions contained in sections 30 to 38, it shall cease to be deductible if it falls within the domain of section 40. But for the prescription of section 40, the expenses or allowances otherwise deductible u/ss 30 to 38 do not fail to qualify for deduction. Thus it is palpable that section 40 is a substantive provision which approaches to increase the tax liability of the assessee in the year of failure to deposit tax within the prescribed period.

15. Failure of the assessee to deduct tax at source *ipso facto* causes disallowance, both as per the pre and post-amendment of section 40(a)(ia) by the Finance Act, 2008. Position was changed by the Finance Act, 2008 as regards the cases where deduction of tax at source is made but there is delay in the payment.

16. As per the scheme of section 40(a)(ia) from its insertion, similar to section 40(a)(i), disallowance was made on the failure of the assessee to pay tax deducted during the previous year, or in the subsequent year before the expiry of the time prescribed u/s 200(1). Sub-section (1) of section 200 provides that any person deducting any sum in accordance with the provisions of this Chapter shall pay within the prescribed time the sum so deducted to the credit of the Central Government or as the board directs. Rule 30 of the Income-tax Rules, 1962 prescribes time for payment to Government account of the tax deducted at source. Different time limits have been prescribed for depositing tax deducted at source under various sections. In some cases such tax deducted at source is required to be deposited on the same day, in others on or before 7 days from the end of the month in which the deduction is made etc. Hence in no case the time limit for depositing the amount of tax deducted at source during the financial year is beyond 30th April, of the next financial year. This is the mandate of section 200(1) read with Rule 30. Reverting to section 40(a)(ia) as originally inserted, any tax deducted at source during the previous year relevant to assessment year 2005-2006 was obliged to be paid either upto 31st March, 2005 and in certain cases where the time is available u/s 200(1) , latest by 30th April, 2005 depending upon the provision under which

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tax is deducted. Failure to abide by such time limits caused disallowance u/s 40(a)(ia) as per by the Finance (No.2) Act, 2004.

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

18. It can thus be seen that the time limit originally provided by section 40(a)(ia) with effect from 01.04.2005 was relaxed to some extent by way of the amendment carried out by the Finance Act, 2008. This amendment by the Finance Act, 2008 was specifically made with retrospective effect from 01.04.2005, being the date of insertion of section 40(a)(ia). It is relevant to note that proviso to section 40(a)(ia) was also consequently amended to provide that where in respect of any such sum, tax has been deducted in any subsequent year, or has been deducted during the last month of the previous year but paid after the said due date; or during any other month of the previous year but paid after the end of the said previous year, such

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

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

> *"(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."*

20. From the above provision as amended by the Finance Act, 2010 with retrospective effect from 1st April, 2010 it can be seen that the only difference which this amendment has made is dispensing with the earlier two categories of defaults as per the Finance Act, 2008, as discussed in para 17 of this order, causing disallowance on the basis of the period of the previous year during which tax was deductible. The first category of disallowances included the cases in which tax was deductible and was so deducted during the last month of the previous year but there was failure to pay such tax on or before the due date specified in sub-section (1) of section 139. The Finance Act, 2010 has not tinkered with this position. The second category of the Finance Act, 2008 which required the deposit of tax before the close of the previous year in case of deduction during the first eleven months, as a pre-condition for the grant of deduction in the year of incurring expenditure, has

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been altered. The hitherto requirement of the assessee deducting tax at source during the first eleven months of the previous year and paying it before the close of the previous year up to 31st March of the previous year as a requirement for grant of deduction in the year of incurring such expenditure, has been eased to extend such time for payment of tax up to due date u/s 139(1) of the Act. As per the new amendment, the disallowance will be made if after deducting tax at source, the assessee fails to pay the amount of tax on or before the due date specified in sub-section (1) of section 139 of the Act. The effect of this amendment is that now the assessee deducting tax either in the last month of the previous year or first eleven months of the previous year shall be entitled to deduction of the expenditure in the year of incurring it, if the tax so deducted at source is paid on or before the due date u/s 139(1). This is the only difference which has been made by the Finance Act, 2010.

21. Non-deduction of tax at source from the specified payments continues to give reason for disallowance u/s 40(a)(ia) under the amended provision, as was there during the prevalence of the Finance (No. 2) Act, 2004 and the Finance Act, 2008. Further the disallowance has also been maintained in the provision in its current form where the assessee, after deduction of tax at source, fails to pay it within the specified time. Partial change has been made in the specified time for payment as a *sine qua non* for deduction in the year of incurring the expenditure. Still further, the mandate of proviso consequently providing the remedial relief by granting deduction in the subsequent year in which tax has been paid, also exists.

22. Having seen the ambit of section 40(a)(ia) right from its insertion up to the amendment made by the Finance Act, 2010, now we proceed to examine as to whether such amendment to Finance Act, 2010 is retrospective from 1st April, 2005 as contended by the assessee or retrospective from 1st April, 2010 by which date this provision has been substituted. At this stage it would be relevant to consider

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the Notes on clauses and Memorandum explaining the provision while introducing Finance Bill, 2010 as under :-

> *Notes on clauses*
>
> *"Clause 12 of the Bill seeks to amend section 40 of the Income-tax Act relating to amounts not deductible.*
>
> *Under the existing provisions contained in sub-clause (ia) of clause (a) of the aforesaid section, non-deduction of tax or non-payment of tax after deduction on payment of any sum by way of 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, results in the disallowance of the said sum, in the computation of income of the payer, on which tax is required to be deducted under Chapter XVII-B.*
>
> *It is proposed to amend sub-clause (ia) of clause (a) of the aforesaid section to provide that disallowance under the said sub-clause will be attracted, if, after deduction of tax during the previous year, the same has not been paid on or before the due date of filing of return of income specified in sub-section (1) of section 139.*
>
> *The proviso to the said sub-clause provides that where in respect of any such sum, tax has been deducted in any subsequent year, or has been deducted during the last month of the previous year but paid after the due date of filing of return or deducted during any other month of the previous year but paid after the end of the said previous year, such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid.*
>
> *This amendment* ***will take effect retrospectively from 1st April, 2010,*** *and will, accordingly,* ***apply in relation to the assessment year 2010-2011 and subsequent years****."*
>
> (Emphasis supplied by us)

23. Memorandum explaining the provisions in the Finance Bill, 2010 provides the justification of the amendment to section 40(a)(ia) in the following words :-

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"Disallowance of expenditure on account of non-compliance with TDS provisions

A. *The existing provisions of section 40(a)(ia) of the Income-tax Act provide for the disallowance of expenditure like interest, commission, brokerage, professional fees, etc. if tax on such expenditure was not deducted, or after deduction was not paid during the previous year. However, in case the deduction of tax is made during the last month of the previous year, no disallowance is made if the tax is deposited on or before the due date of filing of return.*

It is proposed to amend the said section to provide that no disallowance will be made if after deduction of tax during the previous year, the same has been paid on or before the due date of filing of return of income specified in sub-section (1) of section 139.

This amendment is proposed to take effect ***retrospectively from 1st April, 2010*** *and will, accordingly, apply in relation to the assessment year 2010-11 and subsequent years.*

B. *Under the existing provisions of section 201(1A) of the Act, a person is liable to pay simple interest at one per cent. forevery month or part of month in case of failure to deduct tax or payment of tax after deduction.*

With a view to discourage the practice of delaying the deposit of tax after deduction, it is proposed to increase the rate of interest for non-payment of tax after deduction from the present one per cent. to one and one-half per cent. for every month or part of month.

This amendment is proposed to take effect from 1st July, 2010."

(Emphasis supplied by us)

24. The Finance Bill proposed to amend the section for providing that no disallowance will be made if after deduction of tax during the previous year, the same has been paid on or before the due date of filing of return of income specified in sub-section (1) of section 139 of the Act.

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25. It can thus be noticed that the amendment to section 40(a)(ia) by the Finance Act, 2010 has been specifically made retrospectively applicable from the A.Y. 2010-11. It has no where been expressly set out that the amendment is curative or merely declaratory of the previous law. The intention of the legislature as gathered from the Notes on clauses and the Memorandum explaining the provisions of the Finance Bill does not particularly indicate any relaxation in the provision retrospectively from A.Y. 2005-06 by providing that the expenditure on which due tax was deducted up to February, 2005 but paid before the due date specified in section 139(1) of the Act shall not suffer any disallowance in the A.Y. 2005-06.

26. There can be no denial to the fact that merely because a provision has been expressly made prospective, can still, in certain circumstances, be retrospective. In order to buttress his submission that this amendment by the Finance Act, 2010 is retrospective from assessment year 2005-2006, the learned Counsel for the assessee has accentuated on the speech of the Finance Minister while introducing Finance Bill 2010 (reproduced *infra*) which starts with : "Relaxing the current provisions ………". The learned AR argued that the amendment was made with a view to remove the unnecessary hardship caused to the assessee by the earlier provision. It was stated that the TDS provisions caused unnecessary burden on the assesses in deducting tax at source from the payments made by it, on behalf of the Government and then depositing the same in the Treasury within the prescribed time. He stated that the vicarious liability cast on the assessees could not be made liable to punitive action on non-compliance. It was submitted that non-deduction of tax at source from the amounts genuinely spent by the assessee for its business purpose or the due deduction but the late deposit of such tax beyond the time prescribed u/s 200(1) resulting into disallowance u/s 40(a)(ia) caused a lot of hardship to the assessees and thus the amendment by the Finance Act, 2010 relaxing the vigor of such provision should be held to be retrospective from assessment year 2005-2006, being the time of insertion of this provision. It was also put forth on behalf of the

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assessee that there was no warrant for making any disallowance u/s 40(a)(ia) on non-deduction of tax at source for the reason that a small default in not paying say 1% of TDS to the Government u/s 194C causes disallowance under this provision of 100% of the expenditure incurred and the additional tax liability results at 33.99%. He further stated that if the effect of interest u/ss 234B and 234C was also taken into consideration, then liability fastened upon the assessee as a consequence of non-deduction of tax at source at 1% would come to around 45% of the amount of expenditure itself. He invited our attention towards certain representations made to the Hon'ble Finance Minister as Pre-budget memorandum urging the Hon'ble Minister to delete section 40(a)(ia) or to bring some suitable amendment to help the assessees in losing genuine deduction on this account. The learned A.R. stated that the Hon'ble Finance Minister, taking into consideration all such pre-budget representations, has given the relaxation in the terms indicated above. To further strengthen his case, the ld. AR also submitted that the due deduction of tax at source coupled with a little late deposit should be viewed as substantial compliance with the TDS provisions inasmuch as the Government's interest was not affected in any manner as the tax was deducted and paid to it even though a bit belatedly. He relied on certain judgments in support of the contention that the amendment by the Finance Act, 2010 be considered as retrospective from the date of insertion of section 40(a)(ia) as it was aimed at mitigating hardship to the assesses.

27. In the opposition the learned Departmental Representative contended that there was no need to consider the amendment made by the Finance Act, 2010 as retrospective from assessment year 2005-2006 for the reason that Notes on clauses and the Memorandum explaining the provisions in Finance Bill 2010 clearly indicate that the amendment will take effect retrospectively from 1st April, 2010 and will accordingly apply in relation to assessment year 2010-2011 and subsequent years. He stated that the legislature has imposed burden on the assesses in terms of deducting tax at source on the specified payments and

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thereafter depositing it within the stipulated time. Doing this work is not charitable but discharge of duty cast under the statute. By not depositing the tax deducted at source within the prescribed period, the ld. DR stated that the assessee disobeyed the relevant provisions and the visiting of the mandate of section 40(a)(ia) was a natural consequence. It was argued that the addition was rightly sustained by the ld. first appellate authority by holding that the amendment by the Finance Act, 2010 was not retrospective from 01.04.2005.

28. It is settled rule of construction that every statute is *prima facie* prospective unless it is expressly or by necessary implication made to have retrospective operation. Ordinarily the courts are required to gather the intention of the legislature from the overt language of the provision as to whether it has been made prospective or retrospective, and if retrospective, then from which date. What happens sometimes is that the substantive provision, as originally enacted or later amended, fails to clarify the intention of the legislature . In such a situation if subsequently some amendment is carried out to clarify the real intent, such amendment happens to be retrospective from the date the earlier provision was made effective. Such clarificatory or explanatory amendment is declaratory. As the later amendment clarifies the real intent and declares the position as was originally intended, it takes retroactive effect from the date the original provision was made effective. Normally such clarificatory amendment is made retrospectively effective from the earlier date. It may so happen that sometimes the clarificatory or explanatory provision introduced later to depict the real intention of the legislature is not specifically made retrospective by the statute. Notwithstanding the fact that such amendment to the substantive provision has been given prospective effect, nonetheless the judicial or quasi judicial authorities, on a challenge made to it, can justifiably hold such amendment to be retrospective. The justification behind giving retrospective effect to such amendment is to apply the real intention of the legislature from the date such provision was initially introduced. The intention of

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the legislature while introducing the provision is gathered, *inter alia,* from the Finance Bill, Memorandum explaining the provision of the Finance Bill .

29.a. Now we will espouse the cases relied on by both the sides to bolster their respective points of view on the retrospective or prospective operation of the amendment made by the Finance Act, 2010 to section 40(a)(ia). The first case relied by the learned A.R. in support of his contention about the amendment having retrospective effect from A.Y. 2005-06 is the judgment of the Hon'ble Supreme Court in the case of *Allied Motors (P.) Ltd. etc. Vs. CIT [(1997) 224 ITR 677 (SC)].* Section 43B was inserted in the Act with effect from 01.04.1984. At the time of insertion it provided that notwithstanding anything contained in any provision of the Act, a deduction otherwise allowable under this Act in respect of (a) any sum payable by the assessee by way of tax, duty, cess or fee etc. or (b) any sum payable by the assessee as an employer by way of contribution to any provident fund etc. shall be allowed only in computing the income of that previous year in which such sum is actually paid by the assessee irrespective of the previous year in which the liability to pay such sum was incurred. Over the period, scope of section 43B has been expanded by inserting clauses (c), (d), (e) and (f) granting deduction in respect of bonus or commission etc. paid to employees; any sum payable as interest on any loan or borrowing and; any sum payable by the employer in lieu of any leave at the credit of his employee, only in computing the income of that previous year in which such sum is actually paid. The object of the insertion of section 43B, as can be seen from the Memorandum explaining the provisions in the Finance Bill of 1983 (140 ITR St. 160), is to curb the activities of those tax payers who did not discharge their statutory liability of payment of tax or duty or employees' contribution to provident fund for long period but got deduction in that regard by claiming that the liability to pay such amount was incurred. Aimed at curing this situation, section 43B was introduced to provide that the deduction should be allowed only in the previous year in which such sum is actually paid. As a result of

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the implementation of this provision certain unintended consequences followed in the sense that the amount of sales-tax collected by the assesses in the last quarter of the previous year came to be disallowed whereas the liability to pay such sum did not statutorily arise before the end of the year. It is obvious that sales-tax for the quarter ending 31st March can be deposited only after the close of the year. Section 43B led to disallowance of the amount of such sales-tax despite the fact that the liability to pay such sales-tax arose only after the close of the year in April. In order to remedy this unintended consequence, the Finance Act, 1987 inserted first proviso to section 43B with effect from 1st April, 1988 to provide that no disallowance on account of sales-tax etc. shall be made if it is actually paid on or before the due date applicable for furnishing return u/s 139(1) of the Act. The question before the Hon'ble Supreme Court was whether such proviso inserted by the Finance Act, 1987 which came into effect from 1st April, 1988 is prospective or retrospective from assessment year 1984-85, being the year of insertion of section 43B. The Hon'ble Summit Court observed that the proviso was inserted to cure unintended consequences and make the section workable and hence was retrospective.

29.b. It can, therefore, be easily seen that the amendment to section 43B by the Finance Act, 1987 has been held to be retrospective on the ground that it was made to remove unintended consequences of the section and to make it workable, notwithstanding the fact that such proviso was inserted with effect from 1st April, 1988.

29.c. The next judgment relied by the learned A.R. is that of the Hon'ble Supreme Court in *CIT Vs. Alom Extrusions Ltd. [(2009) 319 ITR 306 (SC)]*. There was second proviso to section 43B which provided that no deduction shall be allowed in respect of clause (b), namely, any sum payable by the assessee as an employer by way of contribution to provident fund etc. unless it was actually paid on or before

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the due date as defined in *Explanation* below clause (va) of section 36(1). *Explanation* to section 36(1)(va) defines the "due date" to mean the date by which the assessee is required as an employer to credit an employee's contribution to the employee's account in the relevant fund under any Act, rule, order or notification issued there-under or under any standing order, award, contact of service or otherwise. The result of clause (b) read with second proviso to section 43B was that for claiming deduction, it became imperative to deposit the employees' contribution to provident fund etc. before the due date under the relevant Act etc. In other words, if the employees' contribution to EPF for the month of March was not deposited up to 15th of April or within the grace period, the amount suffered disallowance. The first proviso before the amendment, extending the time for payment of the sums specified in various clauses of section 43B on or before the due date u/s 139(1) as a pre-requisite for granting deduction, did not operate to clause (b) only of section 43B dealing with the employees' contribution to the provident fund etc. On reading first proviso in juxtaposition to the second proviso, it meant that any sum payable by the assessee by way of tax, duty, cess or interest u/s 36(1)(ii) or payable to Scheduled banks or to State Financial Corporations etc. [as per clauses (c) to (e)] or the amount payable in lieu of leave encashment at the credit of the employees was deductible, if paid on or before the due date u/s 139(1) of the Act. The only exception was clause (b), dealing with employees' contribution to provident fund etc., which required the deposit to be made only as per the time limit provided in *Explanation* below section 36(1)(va), for gaining eligibility to deduction. The Finance Act, 2003 removed this anomaly by omitting second proviso and also carried out amendment to the first proviso by making it applicable to all the clauses (a) to (f) of section 43B including clause (b). The amendment so made by the Finance Act, 2003 with effect from 01.04.2004 brought the employees' contribution to EPF etc. on the same pedestal on which the other sums are given under clauses (a), (c) to (f) of section 43B for the purpose of granting deduction. It was claimed that the amendment so made by omitting second

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proviso should be given retrospective effect. The Hon'ble Supreme Court in this case considered all the aspects of this amendment and observed that : "*The second proviso resulted into implementation problems, which have been mentioned hereinabove, and which resulted into enactment of Finance Act, 2003, deleting the second proviso and bringing about uniformity in the first proviso by equating tax, duty, cess, and fee with contributions to welfare funds. Once this uniformity is brought about in the first proviso, then, in our view, the Finance Act, 2003, which is made applicable by Parliament only with effect from April 1, 2004, would become curative in nature, hence, it would apply, retrospectively, with effect from April 1, 1988*". On page 315 of the report, the Hon'ble Supreme Court further noted that if the Departmental contention about giving prospective effect to the amendment was given effect to it would result into hardship and invidious discrimination `*as certain assessees will be denied deduction for all times and they would lose the benefit of deduction even in the year in which they pay the contributions to the welfare funds'*. It was, therefore, held that this amendment, being curative, was retrospective.

29.d. On going through this case also it becomes abundantly clear that the second proviso resulted in implementation problems and the effect of considering the amendment as prospective would have led to denial of deduction in certain cases for all times despite the payment having been made subsequently. It was under such circumstances that the omission of the second proviso and the consequential amendment to the first proviso has been held to be retrospective.

29.e. The next case on which a great deal of emphasis has been placed by the learned A.R. is that of the Hon'ble Supreme Court in *CIT Vs. Gold Coin Health Food (P.) Ltd. [(2008) 304 ITR 308 (SC)]*. The Finance Act, 2002 amended *Explanation 4* to section 271(1)(c) with effect from 01.04.2003 providing that the penalty would be imposed even if the returned income is loss. In the case of *Virtual*

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Soft Systems Ltd. Vs. CIT [(2007) 289 ITR 83 (SC)] (a Bench comprising of two Hon'ble Judges) it was held that prior to the amendment with effect from 1st April, 2003 penalty for concealment of income could not be levied in the absence of any positive income. Doubt was expressed over the correctness of this view by a subsequent Bench. Thereafter in the case of *Gold Coin Health Food P. Ltd. (supra)* (a Bench of three Hon'ble Judges) overruled the judgment in the case of *Virtual Soft Systems Ltd. (supra)* by holding that *Explanation 4* to section 271(1)(c)(iii) regarding the imposition of penalty, even if there is a loss, is clarificatory and not substantive. It was held to be applying even to the assessment years prior to 1st April, 2003, being the date from which it was brought into force.

29.f. From this case, it can be easily seen that the retrospective effect to the amendment to *Explanation 4* by the Finance Act, 2002 has been given by holding that the position even anterior to such amendment was the same in as much as the penalty was imposable even in the case of loss. The intention of the legislature was found to be imposing penalty in all such cases even prior to the amendment and that is how this amendment was held to be clarificatory and therefore, retrospective.

29.g. Similar is the position in the case of *CIT Vs. Kanji Shivji And Co. [(2000) 242 ITR 124 (SC)]*. *Explanation 2* to section 40(b) was introduced with effect from 1st April, 1985 providing that where an individual is a partner in a firm otherwise than as partner in representative capacity, interest paid by the firm to such individual shall not be taken into account for the purposes of clause (b) to section 40. The Hon'ble Supreme Court in the case of *Brij Mohan Das Laxman Das Vs. CIT [(1997) 223 ITR 825 (SC)]* held this insertion to be declaratory in nature and hence retrospective. In this case it was held that the interest paid by the firm to a partner on his individual deposits is not hit by section 40(b), if the person is a partner not in his individual capacity but as representing HUF. The same view was

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taken in *Suwalal Anandilal Jain Vs. CIT [(1997) 224 ITR 753 (SC)]*. However in *Rashik Lal And Co. Vs. CIT [(1998) 229 ITR 458 (SC)]*, somewhat contrary view was expressed. That is how the matter came up before the larger bench of the Hon'ble Supreme Court in *Kanji Shivji And Co. (supra)*. In this case it has been held that *Explanation 2* to section 40(b) is declaratory and retrospective in operation by affirming the judgments in the cases of *Brij Mohan Das Laxman Das (supra)* and *Suwalal Anandilal Jain (supra)*.

29.h. The reasoning for holding the amendment to be retrospective in this case is the Legislative recognition of different capacities an individual may hold. When a person is partner representing his HUF, any transactions with that person in individual capacity are to be treated as distinct from the transactions with HUF. It is this recognition of the theory of different capacities of an individual *ab initio,* that the Hon'ble Supreme Court held that *Explanation 2* only clarified the intent of the legislature and did not grant a new relief by way of insertion of *Explanation 2.*

30. We are reminded of the `Mischief rule', which is commonly called "Heydon's Rule". This rule deals with ascertaining the correct intention of the legislature by looking into the mischief that was sought to be remedied by the legislation. It basically comprises four things to be considered:-

(a) what was the common law before the making of the Act;

(b) what was the mischief and defect for which the common law did not provide;

(c) what remedy the Parliament has appointed to cure the defect; and

(d) the true reasons for the remedy.

Any amendment passing the Heydon's rule is retrospective.

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31. A survey of the above judgments in para 29 *supra* makes it patent that any amendment to the substantive provision which is aimed at clarifying the existing position or removing unintended consequences to make the provision workable has to be treated as retrospective notwithstanding the fact that the amendment has been given effect prospectively.

32.a. Now we will consider the cases on the other side of the line in which the amendment to the substantive provision has been held to be prospective. A Bench of the five Hon'ble Judges in *Padmasundara Rao (Decd.) and Others Vs. State of Tamil Nadu And Others [(2002) 255 ITR 147 (SC)]* has laid down that the language employed in a statute is determinative factor of legislative intent. The first and primary rule of construction is that the intention of the legislation must be found in the words used by the legislature itself.

32.b. In *Reliance Jute and Industries Ltd. Vs. CIT [(1979) 120 ITR 921 (SC)]* the ITO set off the unabsorbed business loss for assessment years 1949-50 and 1950-51 against the business income and held that the remaining amount of unabsorbed loss should be carried forward. In the assessment of later year i.e. 1960-61 the assessee claimed that the unabsorbed loss should be brought forward and set off against the business income of the current year. It was contended on behalf of the assessee that by virtue of section 24(2)(iii) of the Indian Income Tax Act, 1922 as it stood before its amendment with effect from 1st April, 1957, the assessee had acquired a vested right to have the unabsorbed loss carried forward from year to year until it was completely set off and the subsequent amendment limiting the period of carrying forward the loss to eight years could not divest the assessee of the vested right which had accrued to him. In other words, it was submitted that the amendment effected in 1957 was not retrospective in operation. When the matter finally came up before the Hon'ble Supreme Court, the assessee's contention was repelled by holding that the loss incurred in assessment year 1950-

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51 could not be set off against the income of assessment year 1960-61 as the law to be applied is that in force in the relevant assessment year and the law as existing in assessment year 1960-61 has restricted the carry forward up to eight years only.

32.c. From this judgment it can be seen that the contention of the assessee about the retrospective operation of the amendment carried out by the Finance Act, 1957 was rejected on the ground that it was neither expressly nor by necessary implication provided that the amendment will have retrospective effect.

32.d. In *J.K. Synthetics Ltd. Vs. CTO [(1994) 119 CTR (SC) 222]* the question was about the charging of interest on delayed payments under the Rajasthan Sales-tax Act. The Hon'ble Supreme Court held that ordinarily the charging section, which fixes the liability, is strictly construed but that rule of strict construction is not extended to the machinery provisions which are construed like any other statute. The provision for charging of interest, even though forming part of the machinery provisions, was held to be substantive law. It was, therefore, held that any provision in the statute levying interest on delayed payment of tax must be construed as a substantive law and hence prospective.

32.e. In the case of *CWT Vs. Varadharaja Theatre (P.) Ltd. [(2001) 250 ITR 523 (Mad.)]* the issue for consideration was the amendment made to section 40(3)(vi) of the Finance Act, 1983 by the Finance Act, 1988 including cinema building in the exemption list for the purposes of the Wealth-tax Act. It was claimed that the amendment made by the Finance Act, 1988 was declaratory and hence should apply to assessment years 1985-86 to 1986-87. Rejecting this contention, the Hon'ble Madras High Court held that when Parliament enacts a law, it must be understood with reference to the language used in the provision construed in the light of the scheme of the Act and the object of the statute and the provisions therein. `*Every case of removal of hardship by Parliament did not indicate a*

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parliamentary intention to remove that hardship from an anterior date unless the scheme of the Act, the context in which the amendment was made and the language of the amendment warrants such a view'. When the thing which was specifically excluded is subsequently included, such inclusion cannot be regarded as indicative of intention on the part of the legislature to have treated what is now included as having been included at all times. A test, as been laid down by the Hon'ble High Court to consider whether the amendment is prospective or respective, is to examine the amended provision with a view to ascertain as to whether that provision without the aid of amendment is capable of taking within it what was subsequently included after the amendment. Applying this test, the Hon'ble Court held that cinema houses could not be construed as exempt from wealth-tax as per earlier provision.

33. The principle which can be deduced from these cases discussed in paras 29 to 32 is that any amendment to the substantive provision is ordinarily prospective except expressly stated otherwise or it comes out so by necessary implication. Unless the amendment is made applicable with retrospective effect, such amendment to the substantive provision is to be regarded as prospective barring out cases in which it is explanatory or clarificatory on one hand or it aims at removing the unintended consequences.

34. It is the sole prerogative of the legislature to enact, modify and repeal any law and also to introduce any amendment as retrospective or prospective. All provisions of the Act are brought out with a particular object in mind. Soft provisions, in the shape of incentives etc., are usually aimed at specific growth, like that of a particular industry or particular area. On the other hand, the so-called harsh provisions are aimed at mobilizing resources for utilizing them in welfare measures and for general growth of the nation, such as that of health and education of its citizens and making available better infrastructure etc. Any provision in a

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fiscal statute may be described as harsh from the angle of the tax payers, when it either causes some additional burden on the pockets of tax payers in terms of more outflow of money in the shape of tax, interest and penalty or it casts an obligation, fulfillment of which is not feasible. In the present appeal the hardship of the former type has been argued. It is austere that every fresh levy or withdrawal of existing allowance may be described as harsh from the perspective of tax payers, but beneficial from the point of view of nation as a whole. The legislature is empowered to impose certain levy, even if it is harsh provided it falls within the overall framework of the Constitution of India. So long as a provision is constitutionally valid, the judiciary cannot intervene, even if it is harsh. The role of the courts is to interpret a provision in such a manner that the intention of the legislature is clearly brought out and implemented. If the language of a provision is unambiguous and does not require any further elaboration, then there is nothing for the courts to do in this regard. If despite clear language of a provision, the courts interpret it in a way so as to give unintended consequences from the angle of Parliament, the legislature can pull out plug and again introduce the amendment in consonance with its original intention. In such a scenario, the earlier interpretation given by the Courts is overruled by the legislative process. In *Bharat Earth Movers VS. CIT [(2000) 245 ITR 428 (SC)]* it was held that if liability on account of leave encashment arises in the year then deduction is to be allowed even if the liability has to be quantified and discharged at a later date. This Supreme Court judgment has been nullified w.e.f. A.Y. 2002-03 by insertion of Section 43B(f). Similarly the Finance Act, 2008 inserted sec. 271(1B) w.r.e.f. 1.4.1989 to nullify various judgments holding that where `satisfaction' was not recorded in assessment order, it would amount to absence of satisfaction and hence penalty u/s 271(1)(c) shall not be liable. There are several such instances in which the legislature has reinforced its intention by way of amendment setting aside the contrary judicial interpretation.

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35. From the above discussion it is crystal clear that retrospective effect to a provision cannot be ordinarily given by judicial or quasi judicial authorities unless it is expressly given by the legislature. There may be certain situations requiring the giving of retrospective effect. The scope for the courts to validly give retrospective effect to a provision, despite not being clearly given so by the legislature, is limited. It extends to cases where the legislative intent has later been made explicit which was earlier implicit in the provision or the existing provision led to the unintended consequences and made the intention of the legislature unworkable. Any amendment which has not been given retrospective effect by the legislature, can't be construed as retrospective on the solitary ground that the original provision caused some hardship to the assessees. The relevant criteria to be taken into consideration for arriving at the decision about the retrospective or prospective effect of a later provision, is to unearth the intention of the legislature at the time of introducing the original provision and not whether it caused hardship to the taxpayers. If it was very well known at the time of inserting the original provision that it is going to be harsh, then any subsequent relaxation in it will not be retrospective unless expressly stated. The reason for not holding such later amendment as retrospective is manifest that the legislature in its wisdom intended to impose a harsh levy. In such a case the judicial or quasi judicial authorities cannot help the situation by grabbing the legislative power in holding such later relaxation as retrospective, when the legislature has itself made it prospective.

36. In our considered opinion the border line between a substantive provision having retrospective or prospective effect, is quite prominent. One needs to appreciate the nature of the original provision in conjunction with the amendment. Once a provision has been given retrospective effect by the legislature, it shall continue to be retrospective. If on the other hand if the statute does not amend retrospectively, then one has to dig out the intention of the Parliament at the time when the original provision was incorporated and also the new amendment. If the

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later amendment simply clarifies its intention of the original provision, it will always be considered as retrospective. Like the case of *Gold Coin Health Food P. Ltd. (supra)* in which the Hon'ble Supreme Court held that the amendment to *Explanation 4* to section 271(1)(c)(iii) simply clarified the position which was existing since inception of the provision that the penalty is leviable on concealment irrespective of the fact whether ultimately assessed income is positive or negative. Similarly in the case of *Kanji Shivji And Co. (supra),* the Hon'ble Supreme Court held that the purpose of *Explanation 2* to section 40(b) was simply to clarify that the Income-tax Act recognizes individual statues of a person as different from his representative capacity. This *Explanation* did not bring in a new provision but clarified that the position was so since the introduction of the provision itself. In this category of clarificatory or explanatory amendments to the substantive provisions, the object is always to clarify the intention of the legislature as it was there at the time of insertion of the original provision. That is the reason for which the clarificatory amendments are always retrospective irrespective of the date from which effect has been given to them by the legislature .

37. The second category includes the cases in which there was no ambiguity in the language of the provision at the time of its introduction and the object sought was fully attainable. But while making the provision workable, besides the desired results, certain unintended consequences also crop up. In other words, the section was introduced originally with a particular purpose but while giving effect to the provision in the attainment of that purpose, certain outcomes which were never desired or intended by the legislature, also follow. Any amendment to remove such unintended effects, is also always considered to be retrospective from the date of the insertion of the main provision.

38. The second category of cases are to be differentiated from the first category. In both these categories, there is no difficulty in implementing the provision as

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such. Whereas, the first category refers to the cases in which the intention of the legislature behind the provision was not properly understood, the second refers to the cases in which while giving effect to such provision, certain unintended consequences follow. The cases of *Allied Motors (P.) Ltd. (supra)* and *Alom Extrusions Ltd. (supra)* fit into this second category of cases. In *Allied Motors (P.) Ltd. (supra)* the amendment was held to be retrospective on the ground that it was impossible to pay sales-tax for the last quarter before the close of the year as the liability to pay would arise only on or after 1st April. As it could never have been the intention of the legislature to require the assessee to do impossible, the amendment made to section 43B was held to have retrospective effect from the date of insertion of the provision. Similarly in *Alom Extrusions Ltd. (supra),* the implementation of the provision led to the denial of deduction for all times notwithstanding the intention the legislature to allow deduction on payment basis.

39. Here it is important to note that the cases of *Allied Motors (P.) Ltd. (supra)* and *Alom Extrusions Ltd. (supra)* are based on the proposition that the implementation of the earlier provisions led to the consequences which were never envisaged. The emphasis is on the removal of unintended consequences and not intended consequences, even if harsh. It is settled legal position that there cannot be any equity about the tax. It is for the Parliament to decide as to in what manner the tax is to be levied and collected. If a provision is made which is harsh but otherwise constitutional and practical of implementation, there cannot be any question of reading down such provision on the ground of equity or hardship. Intervention becomes necessary when as a result of implementation of a provision, certain such consequences follow which were never intended. If subsequently the rigor of the provision is toned down for addressing to such unintended hardship to the assessees, it would be considered as retrospective. On the other hand if it was clear at the time of the insertion of the provision that some hardship from the assessee's perspective is going to be caused, then a subsequent amendment to reduce such

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hardship from a higher level to lower level, cannot be considered as retrospective unless expressly stated. The reason is obvious that in such cases the hardship which was faced by the assessees at the time of introduction of the provision was very much intended and foreseen and the subsequent amendment is reduction in the intended hardship and not the removal of unintended hardship.

40. On the contrary where the amendment is carried out to the provision with the purpose of adding some additional burden or reducing the existing burden of the assesses, it is always prospective unless expressly stated to be retrospective or falling within the exceptions discussed above such as clarificatory or to remove the unintended hardship. The case of *Reliance Jute and Industries Ltd. (supra)* deals with a situation in which the amendment was carried out to the substantive provision taking away certain benefit to the assessees in terms of extended period for setting off of the brought forward losses. The case of *Varadaraja Theatre Pvt. Ltd. (supra)* is based on facts in which the subsequent amendment granted a benefit to the assessee which was not available as per the earlier provisions. Thus we have noticed that in both types of cases in which the later provision has taken away some right which was earlier available or granted some benefit which was not earlier available, such amendments have been held to be prospective from the dates of insertion as these were neither clarificatory nor intended to remove any unintended hardships.

41. From the above discussion it clearly emerges that there is a clear distinction between the cases in which the later amendment is impliedly retrospective or prospective. That is probably the reason that a question was raised before the Hon'ble Supreme Court in *CIT & Ors. VS. Varas International (P.) Ltd. (2006) 283 ITR 484 (SC)* for deciding as to whether : "*For the amendment of a statute to be construed as being retrospective, should not the amended provision itself indicate, either in terms or by necessary implication, that it is to operate retrospectively?*"

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In the light of this question, the Hon'ble Supreme Court was called upon to reconsider its earlier judgments in *Allied Motors (P.) Ltd. (supra)*, *Suwalal Anandilal Jain (supra), Brij Mohan Das Laxman Das* and *Podar Cement.* The Bench of five Hon'ble Judges in this case noted that there is no conflict between the judgments which requires resolution by way of reference. From this judgment it is apparent that those earlier cases before the Hon'ble Supreme Court for a decision as to whether the amendments considered therein were retrospective or prospective, were decided on the basis of the nature of amendment and the concerned benches rendered appropriate judgments after taking into consideration all the relevant criteria.

42. In the light of the above discussion we will now examine as to whether the amendment made by the Finance Act, 2010 to section 40(a)(ia) inserted with retrospective effect from 1st April, 2010 can be considered as retrospective from the date of insertion of the provision i.e. 1st April, 2005 ? We have noted above that section 40(a)(ia) was inserted by the Finance (No.2) Act, 2004 with effect from 1st April, 2005 debarring deductions otherwise allowable u/s 30 to 38 in respect of the items set out in this provision if the assessee failed to deduct tax at source or after deduction, failed to pay the same during the previous year or in the subsequent year before the expiry of the time prescribed u/s 200(1). The position anterior to the insertion of sub-section (ia) of section 40(a), which is continuing today also, is that the assessees are obliged to deduct tax at source under Chapter XVII-B. The failure to deduct or pay tax as per the requisite provisions entails consequences u/s 201 and 271C etc. by which the assessee is treated as in default, becomes liable to pay interest and also suffers penalty. These provisions were also applicable prior to insertion of section 40(a)(ia). It shows that the duty of the payer to deduct tax at source was always there in the Act. With the insertion of section 40(a)(ia) by the Finance (No.2) Act, 2004 non-deduction of tax at source from the items of expenses specified or failure to pay such tax after deduction, results into one more

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adverse consequence in the shape of disallowance of the amount of expenditure in the year of incurring it. Simultaneous with the disallowance, proviso provides that the deduction of the expenditure shall be allowed in the subsequent year when the deducted tax is paid. To put it simply if there is no deduction of tax at source or after deduction it is paid beyond the previous year or within the time specified u/s 200(1), the income of the first year increases but at the same time the income of the subsequent year is reduced on the payment of tax. It is well-known that each year is a separate and independent unit of assessment. The potential deduction in a later year cannot be allowed to reduce the income for the earlier year and *vice versa*. Total income of an assessee for each year has to be computed as per the provisions of the Act in so far as they apply. It is neither desirable nor permissible to mix up the assessment of two years by claiming that since the deduction shall become permissible in second year, the AO should grant the deduction in the first year and ignore it in the second year. If this view point is accepted then many provisions of the Act shall become otiose. It is incumbent upon the AO to separately compute total income of each year unmindful of the possible deduction or addition in the next year. Thus it can be seen that from assessment year 2005-2006 the assessee's failure to comply with the relevant provisions has the effect of enhancing income by way of non-granting of the relevant deduction in the year of incurring such expenditure. It is an altogether different matter that in the subsequent year the assessee becomes eligible for deduction on payment of tax. Hence apart from the consequences already faced by the assessee for failure to deduct tax at source or pay late as per the prescribed time in terms of the applicability of sections 201 and 271C etc., it came to be additionally hit by section 40(a)(ia) in terms of losing deduction of expenditure in the concerned year for its failure to deduct or pay after deduction of tax at source within the prescribed time, which was otherwise available to it because of having genuinely incurred the expenditure from assessment years 2005-2006. It is seen that the constitutional validity of section 40(a)(ia) was challenged before various courts including the Hon'ble Madras High

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Court in *Tube Investments of India Ltd. And Anr. Vs. Asst. CIT (TDS) And Anr. [(2010) 325 ITR 610 (Mad.)]*. The Hon'ble High Court observed that the substantive provision of section 40(a)(ia) when seen along with its proviso is within legislative competence of Parliament. In the course of judgment, the Hon'ble Court noted that the intention of the legislature is not to tax the payer for its failure to deduct the tax at source. Object of introduction of section 40(a)(ia) has been found to ensure that one of the modes of recovery as provided under Chapter XVII-B is scrupulously implemented without any default in order to augment the said mode of recovery. Thus the provision of section 40(a)(ia) as inserted by the Finance Act, 2004 has been held to be constitutionally valid.

43. The view canvassed on behalf of the assessee, in favour of retrospectivity of the amendment by the Finance Act, 2010 was that the unamended provision caused undue hardship to the assesses, which has been removed. Our attention was invited towards various pre-budget representations made to the Hon'ble Finance Minister impressing upon him either to delete this provision or make it workable. The sum and substance of the submission of the ld. AR was that the relaxation given by the Finance Act 2010 has mitigated the unintended hardship which was earlier caused to the assessee and hence it should be given retrospective effect from the date of insertion of the provision.

44. We do not find any force in this contention. The reason is that there is no doubt that some intended difficulty has been caused by the Finance Act, 2004 on the introduction of section 40(a)(ia). We are calling it hardship to the assessee from a different angle as with the insertion of this provision the expenditure otherwise deductible has become non-deductible in the year of incurring on its failure to deduct tax at source or pay such tax after deduction within the stipulated period. At the same time we are calling it as "intended" for the reason that the legislature in its wisdom brought out this provision with a view to augment compliance of the

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TDS provisions. The objective sought to be achieved by bringing out section 40(a)(ia) is the augmentation of the TDS provision. If in attaining this main objective of augmentation of such provision, the assessee suffers disallowance of any amount in the year of default, which is otherwise deductible, the legislature allowed it to continue. This is the cost which the Parliament has awarded to those assesses who fail to comply with the relevant provisions by considering the overall objective of boosting TDS compliance. Apart from other consequences of failure to deduct tax at source as discussed above, one more adverse consequence has been added. The fact that this provision is still continuing in the Act, proves that the Parliament did not consider it expedient to remove section 40(a)(ia) projecting so called hardship, which is only the side effect in the attainment of the larger goal of augmentation of compliance of TDS provision. The Finance Act, 2008 brought out certain amendments by relaxing the rigor of the provision by making two categories of defaults causing disallowance on the basis of the period of the previous year in which tax was deductible. It is important to note that the amendment by the Finance Act, 2008 was made with retrospective effect from 01.04.2005. Thus it can be seen that from the assessment year 2005-2006 up to assessment year 2009-2010, post the retrospective amendment carried out by the Finance Act, 2008, the first category of disallowances included the cases in which tax was deductible and was so deducted during the last month of the previous year but there was failure on the part of the assessee to pay such tax on or before the due date specified in sub-section (1) of section 139; and the second category included cases in which tax was deductible and was so deducted during the first eleven months of the previous year but there was failure to pay it before the last day of the previous year. The Finance Act, 2010 has made partial change in the specified time for payment of tax only in the above referred second category by extending it from the last day of the previous year to the time specified u/s 139(1) of the Act, in parity with the specified time of the first category. Except for that there is no change in the overall structure of the provision. Non-deduction of tax at source

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from the specified payments still warrants disallowance u/s 40(a)(ia) as was there under the Finance (No. 2) Act, 2004 and the Finance Act, 2008. Further the disallowance *per se* has also been maintained in the provision in its current form, where the assessee, after deduction of tax at source, fails to pay it within the specified time. Still further, the prescription of the proviso providing for the remedial relief in the subsequent year in which tax has been paid, also exists.

45. We are unable to appreciate the contention raised on behalf of the assessee that the undue hardship caused to the assessee has been relaxed by the legislature with the amendment carried out by the Finance Act, 2010. The so called hardship as caused with the insertion of section 40(a)(ia) with effect from 1st April, 2005 is still continuing as such. The effect of amendment by the Finance Act, 2010 is limited only to extending the time available for deposit of tax in the second category of cases from the last day of the previous year to the time specified u/s 139(1) of the Act. Thus it is vivid that the amendment by the Finance Act, 2010 is not aimed at removing any unintended hardship to the assessee, but to relax the intended hardship to some extent by increasing the time available for deposit of tax in one category of cases. When the amendment does not remove the unintended hardship or is not explanatory, the same cannot be held to be retrospective unless it is specifically provided. We again revert to the case of *Varadharaja Theatre (P.) Ltd. (supra)* laying down the test for deciding whether the amendment is prospective or retrospective. In the words of the Hon'ble Court : `*When the thing which was specifically excluded is subsequently included, such inclusion cannot be regarded as indicative of intention on the part of the legislature to have treated what is now included as having been included at all times.'* It is abundantly clear that the time limit to deposit of tax deducted at source for one category of cases has now been extended by the Finance Act, 2010 to the due date u/s 139(1) of the Act. Such a benefit was earlier specifically excluded as it was available only in respect of the other category of cases. As such, it can not be inferred that the later

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extension of time is indicative of the intention of the legislature to have made it available even in the earlier years.

46. In view of the fact that section 40(a)(ia) has been amended by the Finance Act, 2010 with retrospective effect from 01.04.2010, we refuse to declare it as having retrospective effect from the date of insertion of the provision i.e. 01.04.2005.

47. The learned A.R. supported his argument of retrospective effect from one more angle. He invited our attention towards proviso to section 40(a)(ia) substituted by the Finance Act, 2010 with effect from 01.04.2010. It was contended that as per this proviso, 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 section 139(1), such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid. He argued that if the amendment by the Finance Act, 2010 is considered as prospective, then unintended consequences would follow. To elaborate his point of view, he cited an example in which tax is deducted in February 2009 but is paid in July 2009. It was argued that addition will be made in assessment year 2009-2010 by considering the earlier provision, as per which tax deducted at source is not paid on or before the last date of the previous year i.e. 31st March, 2009. As per his contention, the deduction should have been allowed in assessment year 2010-2011 on account of payment made by the assessee in July 2009 as per the mandate of the proviso before amendment. He stated that with the amendment by the Finance Act, 2010 with retrospective effect from 1st April, 2010, the deduction of expenditure can be allowed only in the year of its incurring if the tax has been deducted and paid on or before the due date u/s 139(1) and further the proviso applies to cases in which the same is paid beyond the due date u/s 139(1) so as to allow deduction in computing the income of the previous year in which such tax has been paid. He

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submitted that the assessee's case will fall outside the prescription of the proviso to section 40(a)(ia) as amended by the Finance Act, 2010 as the amount is actually paid in July 2009 which is not beyond but before the due date u/s 139(1). It was thus submitted that the assessee will neither get deduction in assessment year 2009-2010 nor in assessment year 2010-2011.

48. This submission is devoid of any force. The legislature has employed the words `such sum' in the language of the proviso and not `any sum'. These words in the proviso talk of the sum referred to in the main provision of sub-clause (ia) of section 40(a). The words `such sum' have tightly tied the proviso with the main provision. It is imperative to note the proviso to sub-clause (ia) always contained the words `such sum' whether it is the insertion of section 40(a)(ia) by the Finance (No. 2) Act, 2004 or amendment by the Finance Act, 2008 or by the Finance Act, 2010. We need to consider the non-obstante clause in the beginning of section 40 which provides that : "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'". To put it simply, in order to fall within the trap of sub-clause (ia) of section 40(a) causing disallowance, it is *sine qua non* that the expenditure should be otherwise deductible in the year as per sections 30 to 38. Proviso obtains its scope from the main provision of sub-clause (ia) which, in turn, refers to the amounts otherwise deductible in the year of incurring such expenditure under the head `Profits and gains of business or profession'. Only when the assessee is otherwise eligible for deduction in respect of interest, commission, brokerage etc. in the year of its incurring, that the question of making disallowance u/s 40(a)(ia) arises. Thus the proviso is controlled by the main provision of sub-clause (ia) of section 40(a) and cannot be looked upon as *de hors* the main provision. Following the meaning of the words `such sum' in the proviso, it becomes manifest that the sum deductible as expenditure in the year of payment of tax is the one which was not allowed as

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deduction due to disabling provision of section 40(a) in the year of incurring such expenditure. It cannot refer to the expenditure neither claimed nor disallowed as per the main provision in the earlier year. The proviso allows deduction of the amount of such expenditure in computing the income of the subsequent year, when tax is paid. To put it simply, the proviso is only an enabling provision in the subsequent year, of the disabling provision of the main part of the section 40(a)(ia) in an earlier year of incurring such expenditure. When a particular amount of expenditure is disallowed in the first year for failure to deduct tax at source or to pay tax thereon after such deduction as per the main provision of sub-clause (ia), then such amount of expenditure wins deduction on the payment of tax in the later year.

49. It is the complete provision of section 40(a)(ia) together with its proviso as prevailing in a particular year which governs the non-deductibility of expenditure in one year and then its deductibility in the later year. Because of the thread of `such sum' in the language of proviso, it becomes impermissible to look at the main provision as amended by the Finance Act, 2008 for making disallowance of expenditure and then at the proviso as amended by the Finance Act, 2010 for allowing expenditure in the subsequent year of payment. The situation would have been otherwise, if the expression `any sum' had been used in the language of the proviso instead of `such sum'. In that case any amount of expenditure, on which tax deducted had been paid in a particular year, irrespective of the year of incurring expenditure, would have got deduction in such year of payment of tax. It is only in that case that payment of tax made in July 2009 would have suffered complete disallowance both in the A.Y.s 2009-10 and 2010-11. But fortunately, position is not so as the deduction will be permissible to the assessee in A.Y. 2010-11 going by the provision as amended by the Finance Act, 2008.

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50. Now we will examine the example cited by the ld. AR in the light of the above discussion. In that case the assessee claiming deduction in assessment year 2009-2010 will not be granted deduction in that year because of its failure to pay tax within the time stipulated as per the provision standing amended by the Finance Act, 2008, but when such tax is paid after 31st March but before the due date u/s 139(1) say, July 2009, the deduction would be allowed in assessment year 2010-2011 as per proviso to the same provision. As per the provision as amended by the Finance Act, 2010, no deduction of expenditure claimed in A.Y. 2010-11 will be allowed if there is failure on the part of the assessee to pay tax deducted at source on or before the due date specified u/s 139(1). The amended proviso will come to the rescue of the assessee in granting such deduction in the later year of payment of tax, which had suffered disallowance in A.Y. 2010-11. The amended proviso by the Finance Act, 2010 shall apply only in respect of interest, commission or brokerage etc. which have been disallowed in assessment year 2010-2011 for the failure to deposit tax, duty, cess or fee etc. u/s 139(1) and not any expenditure which was claimed and disallowed in A.Y. 2009-10 or any earlier year.

51. It is thus clear that there is no anomaly in the amendment carried out by the Finance Act, 2010 as projected by the ld. AR. Section 40(a)(ia) before and after amendment is workable as independent unit distinctly. As the language of proviso is clear and uses the expression `such sum', the view point canvassed by the ld. AR that the expenditure shall lose deduction in either of the years, is sans merits.

52. From the above para it can be seen that there is no hint in the proviso to section 40(a)(ia), as contended by the ld. AR, that the amendment is retrospective from 01.04.2005. On the other hand the Finance Minister's speech is one more additional reason for holding amendment of the Finance Act, 2010 as not retrospective from assessment year 2005-2006. The relevant para of the speech is as under:-

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> *"137. Relaxing the current provisions on disallowance of expenditure, I propose to allow deduction of such expenditure, if tax has been deducted at any time during the financial year and paid before the due date of filing the return. This will allow most deductors additional time up to September of the next financial year.* ***At the same time, I propose to increase the interest charged on tax deducted but not deposited by the specified date, from 12 per cent. to 18 per cent. per annum."***
>
> (Emphasis supplied by us)

52. A careful perusal of the above para of the speech indicates that it has two components. First is the partial relaxation in the time limit for deposit of tax as discussed above in this order and the second is the simultaneous increase in the interest rate. Use of the words `At the same time' after the relaxation of the time limit for depositing the tax and before the mention of increase in the interest rate on tax deducted but not deposited by the specified date, fairly indicates that both have been linked with each other. Same thing appears from the Memorandum explaining the provisions in the Finance Bill, reproduced above in para 23 of this order, which is in two paras. Whereas para A. explains about the partial relaxation in the time limit for deposit of tax so as to escape disallowance, para B. provides for the increase in the interest rate on tax deducted but not deposited by the specified date. It is thus evident that simultaneous with partial relaxing of the time limit for depositing the tax deducted at source, the interest rate chargeable on tax deducted but not deposited before the specified time has also been increased from 12% to 18% per annum as per section 201(1). It is a trite law that every statute which impairs vested rights acquired under the existing laws or gets a new obligation or attaches a new disability in respect of transactions already passed, must be presumed to be prospective. This view has been reiterated several times by the Hon'ble Supreme Court including in the case of *R Rajagopal Reddy & Others Vs. Padmini Chandrasekharan [(1995) 213 ITR 340 (SC)]*. The Special Bench of the Tribunal in *ITO Vs. Ekta Promoters (P.) Ltd. [(2008) 113 ITD 719 (Del) (SB)]*

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has also held to the same effect that the provision for levy of interest on excess refund u/s 234D is prospective and applies only from assessment year 2004-2005. This Special Bench order has been approved by the Hon'ble Delhi High Court in *Director of Income Tax Vs Jacabs Civil Incorporated [(2011) 330 ITR 578 (Del.)]*. From these precedents it is abundantly clear that the levy of interest under the Act is always prospective unless expressly stated otherwise. It is noticed that section 201(1) has been amended by the Finance Act, 2010 with effect from 01.07.2010 providing for increase in the interest rate from 12% to 18%. If we hold that section 40(a)(ia) has been amended by the Finance Act, 2010 with retrospective effect from A.Y. 2005-2006, then the consequential amendment to section 201(1) would also require the same treatment. As the amendment to section 201(1) has not been made retrospective from assessment year 2005-2006 and it being substantive provision impairing the vested right acquired under the existing provision, cannot be given retrospective effect, in our considered opinion the amendment to section 40(a)(ia) also cannot be held retrospective from A.Y. 2005-06.

53. The learned A.R. emphatically focused on the contention that the expenditure so incurred by the assessee was genuine and by depositing the tax deducted at source a little late, it substantially complied with the provisions of section 40(a)(ia). It was further submitted that there was no logic in disallowing expenditure and causing loss at around 45% of the expenditure in the shape of tax and interest etc. for a mere non-deduction of tax at the rate of 1% of the contract payments. The ld. AR further put forth that the loss caused to the assessee by making disallowance in the current year could not be made good by allowing deduction in the subsequent year on payment of such tax as, in certain cases, it may take several years to absorb the loss caused by the heavy deduction granted in the subsequent year without there being corresponding income. In the backdrop of these submissions, it was vigorously argued that the retrospective effect to the amendment made by the

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Finance Act, 2010 from the date of insertion of section 40a)(ia), that is, A.Y. 2005-06, was the need of the hour.

54. We are not impressed with these submission for ruling the latest amendment to section 40(a)(ia) as having retrospective operation from 1.4.2005. Primarily we find that none of these submissions really deal with the retrospective or prospective effect of the amendment made by the Finance Act, 2010. Rather these depict the hardships caused to the assessee by the very insertion of section 40(a)(ia). All these hardships, such as genuine expenditure suffering disallowance, tax effect of around 45% as against non-deduction of tax at source at the rate of 1% of the expenditure and the difficulty in absorbing the deduction in the subsequent years due to inadequacy of profits etc., continue even after the amendment to the provision by the Finance Act, 2010. It can be seen that the Finance Act, 2010 has not repealed the provision of sec. 40(a)(ia) that it could be claimed that the hardships enumerated above which were caused by the Finance (No. 2) Act, 2004 have been done away with. The latest amendment has simply extended the time limit for deposit of tax deducted at source in certain cases. We have noted above that the other consequences of section 40(a)(ia) are still present in the provision. That apart, it is simple and plain that if the expenditure is not genuine or not incurred for the purpose of business, it would not at all qualify for deduction at the very threshold and the resultant application of section 40(a)(ia) would be automatically ruled out. We are equally unconvinced with the contention of substantial compliance of the provisions on late deposit of tax deducted at source. There can be either compliance or non-compliance of a particular provision. Given the time limit for the deposit of tax deducted at source, if it is deposited by the time prescribed it is a case of compliance of the provision and if it is late deposit even by a single day, it is non-compliance. We cannot say that by depositing such tax belatedly, the assessee substantially complied with the provisions of section 40(a)(ia). If we stretch this argument a little further and suppose that instead of depositing the tax

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deducted at source in July 2005 in the above example, the assessee deposits a day after the due date u/s 139(1) of the Act, would it still mean that the assessee has substantially complied with the provision so as to escape the mischief of section 40(a)(ia)? The answer is in negative. The Finance Act, 2010 has extended the time limit for depositing tax deducted at source by the due date u/s 139(1) of the Act from the earlier lesser time available for compliance. If the tax is deposited by the due date, it would mean escape from the clutches of section 40(a)(ia) for assessment year 2010-2011, but if it is deposited even the next day beyond the due date, natural consequences would follow and it would call for disallowance u/s 40(a)(ia) in the year of incurring the expenditure. In the like manner, in the year under appeal, if the tax deducted at source up to February, 2005 had been deposited up to 31st March, it would have amounted to compliance of the provision, but the late deposit even on 1st April, 2005 would amount to non-compliance warranting interference by section 40(a)(ia) entailing disallowance of expenditure in the Assessment year 2005-06. However the fact that the assessee deposited it beyond the prescribed period, would amount to compliance of the prescription of the proviso, entitling the assessee to deduction in the A.Y. 2006-07.

55. Further if we proceed with the hypothesis of substantial compliance even on late deposit not causing any disallowance u/s 40(a)(ia) in the year of incurring the expenditure, it will make the proviso redundant. When we consider the mandate of section 40(a)(ia) in entirety, it becomes apparent that it has two ingredients, viz., first, the disallowance of expenditure due to non-deduction or non-deposit of tax deducted at source in time and second, the allowing of expenditure in the later year in which the amount of tax deducted at source is deposited. It is one composite provision. Both these limbs, that is, the disallowance of expenditure in the year of incurring expenditure and allowing it in the year of payment are integral part of the provision. As per the proviso, the assessee gets deduction of expenditure in the year of payment of tax deduced at source. But if we allow deduction of the expenditure

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in the year of its incurring on some equitable ground or on the theory of substantial compliance despite the fact the tax was deposited beyond the prescribed time, then it would mean the obliteration the proviso from the provision, which is obviously impossible.

56. In view of the foregoing reasons we are satisfied that the amendment carried out by the Finance Act, 2010 with retrospective effect from assessment year 2010-2011 cannot be held to be retrospective from assessment year 2005-2006. Two diametrically opposite views on this issue, expressed, *inter alia*, by the Mumbai Benches of the tribunal, were placed before us. With utmost respect to the other, we are inclined to accept the one in favour of the Revenue. We, therefore, hold that the authorities below were fully justified in sustaining disallowance of Rs.50.12 lakhs u/s 40(a)(ia) in the year under consideration. The question posted before the Special Bench is, therefore, answered in negative, in favour of the Revenue and against the assessee by holding that the amendment brought out by the Finance Act, 2010 to section 40(a)(ia) w.e.f. 01.04.2010, is not remedial and curative in nature.

57. Ground no.3 dealing with this issue is, therefore, rejected.

58. In the result, the appeal is partly allowed.

Order pronounced in the open Court on this **09th day of September, 2011**.

Sd/-	Sd/-	Sd/-
(D.K.Agarwal)	**(Rajendra Singh)**	**(R.S.Syal)**
Judicial Member	Accountant Member	Accountant Member

Mumbai : **09th September, 2011**.
Devdas*

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2. The Respondent.
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By Order

Assistant Registrar, ITAT, Mumbai.