* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **I.T.A. No. 24/2013**

Reserved on: 23rd August, 2013
% Date of Decision: 6th September, 2013

Commissioner of Income Tax XIII ....Appellant
Through Ms. Suruchi Aggarwal, Sr. Standing Counsel.

Versus

Naresh Kumar …Respondent
Through Nemo.

ITA No. 218/2013

Commissioner of Income Tax Delhi VI ….Appellant
Through Ms. Suruchi Aggarwal, Sr. Standing Counsel.

Versus

M/s Talbros (P) Ltd. ….Respondent
Through Dr. Rakesh Gupta, Advocate.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE SANJEEV SACHDEVA

SANJIV KHANNA, J.

These two appeals by Revenue under Section 260A of the Income Tax Act (Act, for short) in the case of Naresh Kumar and M/s Talbros (P) Ltd. relate to a common assessment year 2008-09, and

raise a common question and, therefore, being disposed of by this common judgment at the stage of admission.

2. The contention of the Revenue is that the Income Tax Appellate Tribunal (Tribunal, for short) in their impugned orders dated 21st May, 2012 (in the case of Naresh Kumar) and 8th October, 2012 (in the case of Talbros (P) Ltd.), has erred in holding that the amendments made to Section 40(a)(ia) of the Act by Finance Act, 2010 should be given retrospective effect. The contention of the Revenue is that these amendments are w.e.f. 1st April, 2010 and are not retrospective and, therefore, not applicable to the assessment year in question i.e. 2008-09.

3. Section 40(a)(ia) was inserted with effect from 1st April, 2005 by Finance (No.2), 2004 Bill and after retrospective amendment by Finance Act, 2008, w.e.f. 1st April, 2005, read as under:-

> "40. 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 "profit and gains of business or profession"...
>
> (ia) any interest, commission or brokerage, rent, royalty, fees for professional services or fees for technical services payable to a resi-dent, or amounts payable to a contactor 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."

4. Section 40(a)(ia) as amended by Finance Act, 2010, we.f. 1st April, 2010 and now reads:

"(ia) any interest, commission or brokerage, rent, royalty, fees for professional services or fees for technical services payable to a resi-dent, 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 deducted in computing the income of the previous year in which such tax has been paid."
>
> (emphasis supplied)

5. Recently, we had occasion to deal with the said unamended and amended provisions and elucidate upon the section in ITA No. 65/2013 titled ***Commissioner of Income Tax-XIII vs. Rajinder Kumar*** decided on 1st July, 2013. Reference was made to the rationale behind the insertion made to Section 40(a)(ia) of the Act w.e.f. 1st April, 2005, which in the memorandum explaining the insertion was as under:

> "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 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 the 1st day of April, 2005 and will, accordingly, apply in relation to the assessment year 2005-06 and subsequent years. (clause 11)."

(emphasis supplied)

6. The rationale behind the amendment 40(a)(ia) by Finance Act, 2010 in the Memorandum explaining the amendments was also reproduced and reads :

"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 2010-11 and subsequent years."

7. In ***Rajinder Kumar's case***(supra), the assessee was following cash system of accountancy and had made certain payments and deducted TDS on the said amounts in March, 2007. TDS was thereafter paid in the month of April, 2007, before the due date i.e. date on which return of income under Section 139(1) of the Act was to be filed. The Revenue in the said case had relied upon the

memorandum maintained by the assessee and contested. The contention of the Revenue was rejected observing that the memorandum did not make any difference and result in credit to the account of the payee. It was accordingly held as under:

> "18. ……The first appellate order again does not specifically state so. In such circumstances, we feel a pragmatic and a practical approach has to be adopted. The respondent assessee had deducted tax at source when the payment was made in the month of March, 2007 and thereafter deposited the payment in the month of April, 2007. It is an accepted position that in case tax was deductible in the month of March, 2007 the due date of payment was in April, 2007 and before due date payment, Rs.4,40,843/- deducted as TDS in the month of March, 2007 was duly paid. It has to be accepted and it is logical that there would be some time gap between date of deduction of tax at source and when payment is deposited. Section 40(a)(ia) and the proviso as amended by Finance Act, 2008 with retrospective effect from 1st April, 2005 notices and acknowledges the said position and, therefore, clause (A) states that where tax "was" deductible and was so deducted during the last month of the previous year but stands paid before the due date specified under sub-section (1) to Section 139, deduction shall be allowed in the said year.
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> 19. Proviso applies when tax was deducted in a subsequent year; when TDS has been deducted during any month of the previous year but paid after the end of the previous year; or TDS was deducted during

the last month of the previous year but paid after the said due date. When proviso applies deduction is to be allowed in the year in which the payment is made. Clause A of the proviso has to be read with clause A of the main Section and not in isolation. Clause A of the main Section and clause A of the proviso will apply in different factual matrix or situations. Clause A of the main Section applies when the tax was deductable and was so deducted during the last month of the assessment year and was paid on or before the due date for filing of the return under Section 139(1). The proviso applies when tax has been deducted in any subsequent year or has been deducted as per clause A thereto during last month of the previous year, but has been paid after the said due date. The expression "said due date" cannot mean the date on which TDS as per the Chapter XVIII B should have been paid. It refers to the due date for filing of the return under Section 139(1) of the Act. Any other interpretation would lead to difficulties, incongruities and conflict between clause A of the main Section and clause A of the proviso. Both would be applicable to the same factual matrix/situation with contradictory stipulations or consequences. Under clause A of the main Section, the TDS deductable and so deducted during the last month should be paid on or before the due date for filing of the return under Section 139(1) but as per the Revenue under the proviso clause A, TDS should be deducted during the last month of the previous year but paid before the "said due date" i.e. the date by which TDS is payable under the Act. This interpretation if accepted means that clause A of the proviso and clause A of the main

> Section would become irreconcilable and mutually contradictory. Clause A of the proviso does not postulate the obvious but seeks to relax the rigor when tax deducted stands paid. This is the reason why the proviso in clause A does not use the expression "tax was deductable and was so deducted" but uses the expression "tax has been deducted …… during the last month of the previous year". The expression "said due date" in the clause A to the proviso does not mean and refer to the date on which tax should have been deposited without interest or penalty under Chapter XVII-B. This is obvious. Clause A to the proviso applies when the deduction is post the period specified by law but in the last month of a previous year. In such cases under the proviso clause A, TDS should be paid before "the said due date" i.e. the date on which return under Section 139(1) of the Act is to be filed."

8. Let us now refer to the facts of the present cases. In the case of Talbros (P) Ltd. there was late deposit of TDS on expenditure of Rs.66,29,926/- as per the following details:

Nature	Amount
Interest	314465
Contractor	5650780
Fees	366586
Rent	612560
INTEREST (GTF)	420829

Total	7365220

9. The amount of TDS to be deducted has not been stated but it varied from 1.03% to 10.33% on the said amounts. No TDS was deducted on interest amount of Rs.7,35,294/-, and there is no quarrel that addition of this amount is justified and should be made under Section 40(a)(ia). The dispute pertains to other amount i.e. Rs.66,29,926/-. The assessment order and the appellate order do not mention the date on which deduction of tax was made or should have been made, but in the assessment order, it is indicated that tax deducted at source prior to February, 2008 was required to be deposited by March, 2008 and TDS deducted in the month of March, 2008 had to be deposited before filing of the return. If we accept the plea of the Revenue that in terms of Section 40(a)(ia) of the Act, the respondent assessee i.e. Talbros (P) Ltd. would not be entitled to expenditure actually incurred and paid to the extent of Rs.66,29,926/-, then the said expenditure would be disallowed and added back in the profit and loss account. The assessee did not succeed in the first appeal but has succeeded before the Appellate Tribunal. Before the CIT (Appeal), the assessee has placed on record document to show that entire TDS amount was paid on or before 4th August, 2004, i.e.

much before the date on which return of income under Section 139(1) had to be filed.

10. Naresh Kumar is an individual and had declared net profit from business of Rs.2,88,494/- on total receipts of Rs.61,14,467/-. No addition was made by the Assessing Officer to the business income as declared which was accepted. The Assessing Officer, however, noticed that in the audit report in column 27B, it has been disclosed as under:

Amount of Tax deducted /collected at Source (in Rs.)	Due date for remittance to Government	Details of payments; Date/ Amount (in Rs.)
2869/-	07/08/2007	23/09/2008
8180/-	07/09/2007	23/09/2008
3881/-	07/10/2007	23/09/2008
5446/-	07/11/2007	23/09/2008
1678/-	07/12/2007	23/09/2008
5853/-	07/01/2007	23/09/2008
12239/-	07/02/2007(2008)	23/09/2008
13526/-	07/03/2008	23/09/2008

11. The assessment order records that the assessee had failed to deposit TDS of Rs.52,672/- on or before 31st March, 2008 and, therefore, expenditure actually and duly incurred and paid of Rs.52,10,873/- cannot be allowed and has to be added to the taxable income. As is apparent from the table above, this amount of

Rs.52,672/- being 1.03% of the expenditure of Rs.52,10,873/- was deposited on or before 30th September, 2008, i.e., before the date of filing of the return for the Assessment Year 2008-09. The consequence was addition of Rs.52,10,873/- to the total income of the assessee, which increased from Rs.2,81,471/- to Rs.54,97,592/-. In addition, the respondent-assessee became liable to pay interest under Section 234B, 234C, 234D as well as 244A of the Act. Penalty proceedings under Section 271(1)(c) were also initiated. Of course, the assessee would be liable to pay interest on late deposit of TDS or penalty for the same.

12. Naresh Kumar, the respondent assessee succeeded in the first appeal and has succeeded before the Tribunal.

13. Failure to deduct or pay TDS results in several consequences. First being levy of interest under Section 201/201A which is mandatory. The second is levy of penalty under Section 221 and Section 271C of the Act. It can also result in prosecution under Section 276B which postulates punishment of upto seven years imprisonment and fine. Earlier even failure to deduct tax at source was punishable under Section 276B of the Act.

14. Provisions relating to deduction of tax at source are important as this ensures that tax so deducted gets deposited with the

Government and non-taxpayers/filers can be identified. The deductee do not suffer and are not deprived of credit of deduction made from their income. Section 40(a)(ia) is a provision incorporated with the said objective and purpose in mind. It is not basically a penal provision as when the TDS is deposited, the amount on which deduction was made is allowed as an expenditure incurred in previous year in which the payment of TDS is made. Thus, it results in shifting of the year in which the expenditure can be claimed, even if payment has been made to the recipient and is to be allowed as expenditure in another year. Principle of matching i.e. matching of receipts with expenditure to the extent indicated in Section 40(a)(ia), therefore, gets affected. The provision can work harshly and may be very stringent in some cases as is apparent from these facts stated in the case of Naresh Kumar. Strict compliance of Section 40(1)(ia) may be justified keeping in view the legislative object and purpose behind the provision but a provision of such nature should not be allowed to be converted into an iron rod provision which metes out stern punishment and results in malevolent results, disproportionate to the offending act and aim of the legislation. Legislative purpose and the object is to ensure payment and deposit of TDS with the Government. TDS results in collection of tax. Legislature can and

do experiment and intervene from time to time when they feel and notice that the existing provision is causing and creating unintended and excessive hardships to citizens and subjects or have resulted in great inconvenience and uncomfortable results. Obedience to law is mandatory and has to be enforced but the magnitude of punishment must not be disproportionate by what is required and necessary. The consequences and the injury caused, if disproportionate do and can result in amendments which have the effect of streamlining and correcting anomalies. The amendments made in 2010 were a step in the said direction and this aspect has to be kept in mind when we examine and consider whether the amendment should be given retrospective effect or not.

15. Question whether the amendment is retrospective or prospective is vexed and rigid rule can be applied universally. Various rules of interpretation have developed in order to determine whether or not, an amendment is retrospective or prospective. Fiscal statutes imposing liabilities are governed by normal presumption that they are not retrospective. The cardinal rule is that the law to be applied, is that which is in force on the first day of the assessment year, unless otherwise mandated expressly or provided by necessary implication. The aforesaid dictum is based upon the principle that a

new provision creating a liability or an obligation, affecting or taking away vested rights or attaching new disability is presumed to be prospective. However, it is accepted that Legislatures have plenary power to make retrospective amendments, subject to Constitutional restrictions.

16. Based upon the aforesaid broad dictum, Judges and jurists have drawn distinction between procedural and substantive provisions. Substantive provisions deal with rights and the same are fundamental, while procedural law is concerned with the legal process involving actions and remedies. Amendments to substantive law are treated as prospective, while amendments to procedural law are treated as retrospective. This distinction itself is not free from difficulties as right to appeal has been held to be a substantive law, but law of limitation is regarded as procedural. There is an interplay and interconnect between what can be regarded as substantive and procedural law [see ***Commissioner of Income Tax versus Shrawan Kumar Swarup & Sons***, (1998) 232 ITR 123(SC)].

17. There are decisions, which hold that process of litigation or enforcement of law is procedural. Similarly, machinery provision for collection of tax, rather than tax itself is procedural. Read in this

context, it can be strongly argued that Section 40(a)(ia) at least to the extent of the amendment is procedural as by enacting Section 40(a)(ia)the Legislature did not want to impose a new tax but wanted to ensure collection of TDS and the amendments made streamline and remedy the anomalies noticed in the said procedure by allowing deduction in the year when the expenditure is incurred provided TDS is paid before the due date for filing of the return. Remedial statutes are normally not retrospective, on the ground that they may affect vested rights. But these statutes are construed liberally when justified and rule against retrospectivity may be applied with less resistance [See ***Bharat Singh versus Management of New Delhi Tuberculosis Centre***, (1986) 2 SCC 614 and ***Workmen of Messrs Firestone Tyre & Rubber Company of India (P) Ltd. Versus Management,*** AIR 1973 SC 1227].

18. It is interesting to note that earlier English decisions have held that an enactment fixing a penalty or maximum penalty for offence is merely procedural for the purpose of determining retrospectivity [See ***DPP versus Lamb***, [1941] 2 KB 89) and ***R versus Oliver***, (1944) 29 Cr. App. 137] . This view, however, has been criticized in Reherd

Athlumney [1898] 2QB547 on the ground that higher or greater punishment impairs existing rights or obligation;-

> "No rule of construction is more firmly established than this; that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matters of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only."

19. The word 'fairly' used in the aforesaid quotation is important and relevant, but for application of another rule of interpretation. *G.P. Singh in "Principles of Statutory Interpretation"*, 13th Edition, 2012 at page 538 under the sub-heading "Recent statements of the rule against Retrospectivity" has greatly emphasized the principle of fairness and observed that classification of statute either substantive or procedural does not necessarily determine whether the enactment or amendment has retrospective operation, e.g., law of limitation is procedural but its application to past cause of action may result of reviving or extinguishing a right, and such operation cannot be said to be procedural. Similarly, when requisites of an action under the new

statute, draws from a time incident to its passing, rule against retrospectivity may not be applicable.

20. In the said text, reference has been made to formulation by Dixon, C.J. in ***Maxwell versus Murphy***, (1957) 96 CLR 261 holding:-

> "The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect the rights or liabilities which the law had defined be reference to the past events. But given the rights and liabilities fixed by reference to the past facts, matters or events, the law appointing or regulating the manner in which they are to be enforced or their enjoyment is to be secured by judicial remedy is not within the application of such a presumption".

21. Identically, in ***Secretary of State for Social Security versus Tunnicliffe***, (1991) 2 All ER 712, Staughton, L.J. has expressed the said principle in the following words:-

> "The true principle is that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree- the greater the unfairness, the more it is to be

> expected that Parliament will make it clear if that is intended".

22. House of Lords in ***L' office Cherifien des Phosphates versus Yamashita Shinnihon Steamship Co. Ltd.***, (1994) 1 All ER 20 has said the question of fairness has to be answered by taking into account various factors, viz., value of the rights which the statute affects; extent to which that value is diminished or extinguished by the suggested retrospective effect of the statute; unfairness of adversely affecting the rights; clarity of the language used by Parliament and the circumstances in which the legislation was created. These factors have to be weighed together to provide an answer whether the consequences of reading the statute with suggested degree of retrospectivity is unfair; that the words used by the Parliament could not have been intended to mean what they might appear to say. This principle was applied while interpreting a new provision in Arbitration Act in this case observing that the delay attributable to the claimant in pursuing a claim before enactment of the new provision, could be taken into consideration for dismissal.

23. Principle of "fairness" has not left us untouched and was applied by the Supreme Court in ***Vijay versus State of Maharashtra***, (2006) 6 SCC 289 in the following words:-

> "…The negotiation is not a rigid rule and varies with the intention and purport of the legislation, but to apply it in such a case is a doctrine of fairness. When a new law is enacted for the benefit of the community as a whole, even in absence of a provision the statute may be held to be retrospective in nature."

24. In ***Allied Motors (P) Limited versus Commissioner of Income Tax***, 1997 (224) ITR 677, it was held that the new proviso to Section 43B should be given retrospective effect from the inception on the ground that the proviso was added to remedy unintended consequences and supply an obvious omission. The proviso ensured reasonable interpretation and retrospective effect would serve the object behind the enactment.

25. In ***State through CBI, Delhi versus Gian Singh and Another***, AIR 1999 SC 3450 extreme penalty of death was diluted to alternative option of imprisonment for life recording that the legislative benevolence could be extended to an accused, who awaits judicial verdicts against his sentence. Earlier in ***Ratan Lal versus State of Punjab***, AIR 1965 SC 444 reference was made to Section 6 of the Probation of Offenders Act, 1958 and it was observed that if the Act was not given retrospective operation, it would lead to anomalies and thus could not be the intention of the Legislature.

26. Principle of matching which is disturbed by Section 40(a)(ia) of the Act, may not materially be of consequence to the Revenue when the tax rates are stable and uniform or in cases of big assessees having substantial turnover and equally huge expenses as they have necessary cushion to absorb the effect. However, marginal and medium taxpayers, who work at low G.P. rate and when expenditure which becomes subject matter of an order under Section 40(a)(ia) is substantial, can suffer severe adverse consequences as is apparent from the case of Naresh Kumar. Transferring or shifting expenses to a subsequent year, in such cases, will not wipe off the adverse effect and the financial stress. Nevertheless the Section 40(a)(ia) has to be given full play keeping in mind the object and purpose behind the section. At the same time, the provision can be and should be interpreted liberally and equitable so that an assessee should not suffer unintended and deleterious consequences beyond what the object and purpose of the provision mandates. Case of Naresh Kumar is not one of rare cases, but one of several cases as we find that Section 40(a)(ia) is invoked in large number of cases.

27. One important consideration in construing a machinery section is that it must be so construed so as to effectuate the liability imposed

by the charging section and to make the machinery workable. However, when the machinery section results in unintended or harsh consequences which were not intended, the remedial or correction action taken is not to be disregarded but given due regard.

28. It is, in this context, that we had in ***Rajinder Kumar's case (supra)*** observed as under:

> "22. Now, we refer to the amendments which have been made by the Finance Act, 2010 and the effect thereof. We have already quoted the decision of the Calcutta High Court in ***Virgin Creations*** (supra). The said decision refers to the earlier decision of the Supreme Court in the case of ***Allied Motors (P) Limited*** (supra) and ***Commissioner of Income Tax versus Alom Extrusions Limited***, (2009) 319 ITR 306 (SC). In the case of ***Allied Motors (P) Limited*** (supra), the Supreme Court was examining the first proviso to Section 43B and whether it was retrospective. Section 43B was inserted in the Act with effect from 1st April 1984 for curbing claims of taxpayers who did not discharge or pay statutory liabilities but claimed deductions on the ground that the statutory liability had accrued. Section 43B states that the statutory liability would be allowed as a deduction or as an expense in the year in which the payment was made and would not be allowed, even in cases of mercantile system of accountancy, in the year of accrual. It was noticed that in some cases hardship would be caused to assessees, who paid the statutory dues within the prescribed period though the payments so made would

not fall within the relevant previous year. Accordingly, a proviso was added by Finance Act, 1987 applicable with effect from 1st April, 1988. The proviso stipulated that when statutory dues covered by Section 43B were paid on or before the due date for furnishing of the return under Section 139(1), the deduction/expense, equal to the amount paid would be allowed. The Supreme Court noticed the purpose behind the proviso and the remedial nature of the insertion made. Of course, the Supreme Court also referred to Explanation 2 which was inserted by Finance Act, 1989 which was made retrospective and was to take effect from 1st April, 1984. Highlighting the object behind Section 43B, it was observed that the proviso makes the provision workable, gives it a reasonable interpretation. It was elucidated:

> "12. In the case of Goodyear India Ltd. V. State of Haryana this Court said that the rule of reasonable construction must be applied while construing a statute. Literal construction should be avoided if it defeats the manifest object and purpose of the Act.
>
> 13. Therefore, in the well-known words of Judge Learned Hand, one cannot make a fortress out of the dictionary; and should remember that statutes have some purpose and object to accomplish whose sympathetic and imaginative discovery is the surest guide to their meaning. In the case of R.B. Judha Mal Kuthiala v. CIT, this Court said that one should apply the rule of reasonable interpretation. A

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

14. This view has been accepted by a number of High Courts. In the case of CIT v. Chandulal Venichand, the Gujarat High Court has held that the first proviso to Section 43-B is retrospective and sales tax for the last quarter paid before the filing of the return for the assessment year is deductible. This decision deals with Assessment Year 1985-85. The Calcutta High Court in the case of CIT v. Sri Jagannath Steel Corpn. has taken a similar view holding that the statutory liability for sales tax actually discharged after the expiry of the accounting year in compliance with the relevant statute is entitled to deduction under Section 43-B. The High Court has held the amendment to be clarificatory and, therefore, retrospective. The Gujarat High court in the above case held the amendment to be curative and explanatory and hence retrospective. The Patna High court has also held the amendment inserting the first proviso to be explanatory in the case of Jamshedpur Motor Accessories Stores v. Union of India. The special leave petition from this decision of the Patna High Court

was dismissed. The view of the Delhi High Court, therefore, that the first proviso to Section 43-B will be available only prospectively does not appear to be correct. As observed by G.P. Singh in his Principles of Statutory Interpretation, 4th Edn. At p. 291: "It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended." In fact the amendment would not serve its object in such a situation unless it is construed as retrospective. The view, therefore, taken by the Delhi High Court cannot be sustained."

23. Section 43B deals with statutory dues and stipulates that the year in which the payment is made the same would be allowed as a deduction even if the assessee is following the mercantile system of accountancy. The proviso, however, stipulates that deduction would be allowed where the statutory dues covered by Section 43B stand paid on or before the due date of filing of return of income. Section 40(a)(ia) is applicable to cases where an assessee is required to deduct tax at source and fails to deduct or does not make payment of the TDS before the due date, in such cases, notwithstanding Sections 30 to 38 of the Act, deduction is to be allowed as an expenditure in the year of payment unless a case is covered under the exceptions carved out. The amended proviso as inserted by Finance Act, 2010 states where an assessee has made payment of the TDS on or before the due date of filing of the return under Section 139(1), the sum shall be allowed as an expense in computing the income of the

previous year. The two provisions are akin and the provisos to Sections 40(a)(ia) and 43B are to the same effect and for the same purpose.

24. In ***Podar Cement Private Limited*** (supra), the Supreme Court considered whether term 'owner' would include unregistered owners who had paid sale consideration and were covered by Section 53A of the Transfer of Property Act. The contention of the assessees was that the amendments made to the definition of term 'owner' by Finance Bill, 1987 should be given retrospective effect. It was held that the amendments were retrospective in nature as they rationalise and clear the existing ambiguities and doubts. Reference was made to Crawford: 'Statutory Construction' and 'the principle of Declaratory Statutes', Francis Bennion: 'Statutory Interpretation', Justice G.P. Singh's 'Principles of Statutory Interpretation', it was observed that sometimes amendments are made to supply an obvious omission or to clear up doubts as to the meaning of the previous provision. The issue was accordingly decided holding that in such cases the amendments were retrospective though it was noticed that as per Transfer of Property Act, Registration Act, etc. a legal owner must have a registered document.

25. In view of the aforesaid discussion in paras 18,19 and 20, it is apparent that the respondent assesse did not violate the unamended section 40(a)(ia) of the act. We have noted the ambiguity and referred their contention of Revenue and rejected the interpretation placed by them. The

> amended provisions are clear and free from any ambiguity and doubt. They will help curtail litigation. The amended provision clearly support view taken in paragraphs 17 – 20 that the expression "said due date" used in clause A of proviso to unamended section refers to time specified in Section 139(1) of the Act. The amended section 40(a)(ia) expands and further liberalises the statue when it stipulates that deductions made in the first eleven months of the previous year but paid before the due date of filing of the return, will constitute sufficient compliance."

29. In view of the aforesaid discussion, we do not find any merit in the present appeals filed by the Revenue and they are dismissed.

(SANJIV KHANNA)
JUDGE

(SANJEEV SACHDEVA)
JUDGE

SEPTEMBER 6th, 2013
Kkb/VKR