ORDER

Per George George K., JM:

These two appeals at the instance of department are filed against the CIT(A) orders dated 29.3.2010 and 5.10.2011, pertaining to assessment years 2007-08 and 2008-09 respectively.

2. Since, common issues are involved in these appeals and they pertains to the same assessee, they were heard together and disposed off by this consolidated order.

3. For the sake of convenience, the grounds raised for assessment year 2007-08 are reproduced below:-
“1. The Ld. CIT(A) erred in deleting the addition of Rs. 64,55,563/- made u/s of sections 40(a)(ia) of the I.T. Act, 1961 as the assessee failed to comply the provisions of section 194J on the Lab Testing Charges.
2. Whether on the facts and circumstances of the case, the Ld. CIT(A) has erred in deleting the addition of Rs. 88,689/- made u/s 40(a)(ia) of the I.T. Act, 1961 as the assessee failed comply with the provisions of Section 194C on printing the stationery expenses.”

4. The A.O in the case of scrutiny assessment for assessment year 2007-08, disallowed a sum of Rs. 64,55,563/- and 88,689/- by invoking the provisions of sec. 40(a)(ia) of the Act. A sum of Rs. 64,55,563/- was disallowed by the A.O by observing the following:-

“23. .................I am of the opinion that assessee was getting professional and technical services from SRL Ranbaxy Ltd., as such payments made to SRL Ranbaxy Ltd. covered u/s 194J of the I.T Act, 1961 and TDS has to be deducted at source on these payments.

24. As the assessee failed to comply the provision of section 194J or 194C, the expenses amounting to Rs. 64,55,563/- are disallowed u/s 40(a)(ia) and added back to total income of the assessee. ....................

4.1 A sum of Rs. 88,689/- was disallowed by the A.O for the following reasons:-

“25. Vide order sheet entry dated 23.11.2009 the assessee was also asked to furnish party wise details of expenses for printing and stationary. In reply to this assessee has filed copy of the ledger account for printing and stationary expenses. Perusal of the same it is revealed that that assessee has paid an amount of Rs. 88,689/- to M/S WE ARE PRINTER. The assessee was required to explain whether tax has been deducted on payments to the above party. In response to this vide letter dated 30.11.2009, the assessee has stated that out of this payment amt of Rs. 48,520/- is on account of purchases. If the assessee has got its MRI envelopes, visiting cards, forms, addresses, receipts book etc printed for the exclusive use of the assessee, it cannot be termed as purchases but it is purely job work liable for TDS u/s 194C.
26. As the total amount paid during the year exceeded Rs. 50,000/- the assessee was liable to deduct tax u/s 194C. Since, he failed to comply with the provision of section 194C, the expenditure amounting to Rs. 88,689/- are disallowed u/s 40(a)(ia) and added back to the income of the assessee.

4.2 Similar additions were made on identical set of facts for assessment year 2008-09 also by A.O.

5. On appeal, the CIT(A) deleted both the additions made by the Assessing Officer. The reasoning of the CIT(A) for deleting the addition of Rs. 64,55,563/- for assessment year 2007-08 reads as follows:-

“13. The appellant has also referred to various judicial decisions in support of his claim that he was not liable for deduction u/s 194J. Considering the above and the judicial decisions cited by the appellant, it is clear that the appellant is an agent of M/s SRL Ranbaxy Ltd. and is not liable for deduction u/s 194J. In view of these facts, the disallowance u/s 40(a)(ia) is not legally tenable and is deleted. The ground is allowed.”

5.1 The reasoning of the CIT(A) for deleting the additions of Rs. 88,689/- for the assessment year 2007-08 are as follows:-

“15. The appellant has argued that “on this amount no TDS can be supposed to have been deducted as it is merely contract for sale and not works contract. (Reliance placed on latest Bang ITAT ruling in SPICE and BHC in BDA; DHC in Dabur etc.)”

Considering the facts, this is a case of purchase of goods and not a case of job work liable for TDS u/s 194C. Therefore, the disallowance u/s 40(a)(ia) is not justified and is deleted. The ground is allowed.”

5.2 For similar reasoning the CIT(A) has also deleted the additions made by the Assessing Officer for assessment year 2008-09.
6. The Revenue being aggrieved is an appeal before us. The ld. DR supported the order of the Assessing Officer. The ld. AR on the other hand submitted that he has strong case on merits, however, it was submitted that the matter can be examined afresh by the Assessing Officer in light of second proviso to sec. 40(a)(ia) of the Act, which, according to him, is retrospective in operation, in view of judicial precedents on the subject.

7. We have heard rival submissions and perused the material on record. The second proviso to sec. 40(a)(ia) inserted by Finance Act, 2012 reads as under:-

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

7.1 Even though above stated proviso was inserted w.e.f 1.4.2013, the Agra Bench of the Tribunal in the case of Rajiv Kumar Aggarwal in ITA No. 337/Agra/2013 order dated 29.5.2013, following the Jurisdictional High Court in the case of CIT Vs Rajinder Kumar reported in 362 ITR 241 and held that the second proviso is declaratory and curative in nature and has retrospective effect from 1.4.2005. The relevant findings of the Agra Bench of the Tribunal cited (supra) reads as follows:-

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

Their Lordships thus recognized the bigger picture of realization of legitimate tax dues, as object of Section 40(a)(ia), and the need of its fair, just and equitable interpretation. This approach is qualitatively different from perceiving the object of Section 40(a)(ia) as awarding of costs on the "assessee who fail to comply with the relevant provisions by considering overall objective of boosting TDS compliance ". Not only the conclusions arrived at by the special bench were disapproved but the very fundamental assumption underlying its approach, i.e. on the issue of the object of Section 40(a)(ia), was rejected too. In any event, even going by Bharti Shipyard decision (supra), what we have to really examine is whether 2012 amendment, inserting second proviso to Section 40(0)(ia), deals with an "intended consequence" or with an "unintended consequence ".

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

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

9. On a conceptual note, primary justification for such a disallowance is that such a denial of deduction is to
compensate for the loss of revenue by corresponding income not being taken into account in computation of taxable income in the hands of the recipients of the payments. Such a policy motivated deduction restrictions should, therefore, not come into play when an assessee is able to establish that there is no actual loss of revenue. This disallowance does de-incentivize not deducting tax at source, when such tax deductions are due, but, so far as the legal framework is concerned, this provision is not for the purpose of penalizing for the tax deduction at source lapses. There are separate penal provisions to that effect. De-incentivizing a lapse and punishing a lapse are two different things and have distinctly different, and sometimes mutually exclusive, connotations. When we appreciate the object of scheme of section 40(a)(ia), as on the statute, and to examine whether or not, on a “fair, just and equitable” interpretation of law- as is the guidance from Hon’ble Delhi High Court on interpretation of this legal provision, in our humble understanding, it could not be an "intended consequence" to disallow the expenditure, due to non deduction of tax at source, even in a situation in which corresponding income is brought to tax in the hands of the recipient. The scheme of Section 40(a)(ia), as we see it, is aimed at ensuring that an expenditure should not be allowed as deduction in the hands of an assessee in a situation in which income embedded in such expenditure has remained untaxed due to tax withholding lapses by the assessee. It is not, in our considered view, a penalty for tax withholding lapse but it is a sort of compensatory deduction restriction for an income going untaxed due to tax Withholding lapse. The penalty for tax withholding lapse per se is separately provided for in Section 271C. and, section 40(a)(ia) does not add to the same. The provisions of Section 40(a)(ia), as they existed prior to insertion of second proviso thereto, went much beyond the obvious intentions of the lawmakers and created undue hardships even in cases in which the assessee's tax withholding lapses did not result in any loss to the exchequer. Now that the legislature has been compassionate enough to cure these shortcomings of
provision, and thus obviate the unintended hardships, such an amendment in law, in view of the well settled legal position to the effect that a curative amendment to avoid unintended consequences is to be treated as retrospective in nature even though it may not state so specifically, the insertion of second proviso must be given retrospective effect from the point of time when the related legal provision was introduced. In view of these discussions, as also for the detailed reasons set out earlier, we cannot subscribe to the view that it could have been an "intended consequence" to punish the assesses for non deduction of tax at source by declining the deduction in respect of related payments, even when the corresponding income is duly brought to tax. That will be going much beyond the obvious intention of the section. Accordingly, we hold that the insertion of second proviso to Section 40(a)(ia) is declaratory and curative in nature and it has retrospective effect from 1st April, 2005, being the date from which sub clause (ia) of section 40(a) was inserted by the Finance (No.2) Act, 2004.

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

7.2 In view of the above said order of the Co-ordinate Bench order of the Tribunal cited (supra), we direct the A.O to verify whether the payee has filed his return of income and paid taxes within the stipulated time.
If it has done so, no disallowance u/s 40(a)(ia) in respect of the above said payments is called for.

7.3 Before concluding we have to mention that the assessee has filed necessary confirmation from the payee that they have paid the taxes on the amounts received from the assessee. The confirmation filed by payee is enclosed in the paper book filed by the assessee and is part of the record filed before the CIT(A). For the aforesaid reasoning these two cases are set aside to the file of the A.O for the limited purpose of examination whether the payee has filed its return of income and paid the taxes on the same within the stipulated time.

8. Therefore, the appeals filed by the Revenue are allowed for statistical purposes.

Order pronounced in the open Court on 25/7/2014

Sd/-
(B. C. Meena)
ACCOUNTANT MEMBER
Dated: 25/7/2014

Sd/-
(George George K.)
JUDICIAL MEMBER

*Subodh*
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR