IN THE INCOME TAX APPELLATE TRIBUNAL "B(SMC)" BENCH: KOLKATA
[Before Shri Mahavir Singh, JM]

I.T.A. No.1905/Kol/2014
Assessment Year: 2007-08

Santosh Kumar Kedia (PAN:AEVPK0542C)	Vs.	Income-tax Officer, Wd-56(1), Kolkata
(Appellant)		(Respondent)

Date of hearing: 04.03.2015
Date of pronouncement: 04.03.2015

For the Appellant: Shri Pawan Kr. Kedia, FCA
For the Respondent: Shri Sanjay, Addl. CIT, Sr. DR

ORDER

Per Shri Mahavir Singh, JM :

This appeal by assessee is arising out of order of CIT(A)-XXXVI, Kolkata in appeal No. 654/CIT(A)-XXXVI/Kol/W-56(1)Kol/09-10/378 dated 21.07.2014. The assessment was framed by ITO, Wd-56(1), Kolkata, u/s. 143(3) of the Income Tax Act, 1961 (hereinafter referred to as õthe Actö) for Assessment Year 2007-08 vide his order dated 15.09.2009.

2. The first issue in this appeal of assessee is against the order of CIT(A) confirming the disallowance of interest for non-deduction of TDS u/s. 194A of the Act by invoking the provision of section 40(a)(ia) of the act by the AO. For this, assessee has raised following ground nos. 1 to 4:

> *"1. For that in view of the facts & circumstances the C.I.T.(Appeals) -- XXXVI, Kolkata erred in law in confirming the disallowance of interest of Rs.91929/- u/s 194A, for failure of the appellant to deduct tax at source on in so far the said section does not give any authority to the A.O. to make any addition or disallowance.*
>
> *2.Without prejudice, the C.I.T.(A) erred in law in confirming the disallowance of interest of Rs.91929/- paid on loans taken in individual capacity and applied for business purposes in so far as the accounts of proprietary firm of the appellant was only subjected to audit u/s 43B and there was no need for the appellant to deduct tax at source on borrowings in personal capacity.*
>
> *3. Without prejudice, the C.I.T.(A) erred in law in confirming the disallowance of interest of Rs.91929/- in the spirit of instruction no. 275/201l95-IT(B) dated 29/0111997 issued by CBDT and approved by Hon'ble Supreme Court in the case of Hindustan Coca Cola*

Beverages (P) Ltd [2007] 293 ITR 226 according to which the appellant cannot be forced to deduct tax at source if there is no tax liability in the hands of payee. This intent of law duly found it's place in the statute book by way of proviso inserted to section 40(ia) by Finance act, 20 12. The reliance placed by C.I.T.(A) on the judgment of Hon'ble High Court of Madras in the case of Tube Investment is out of context and does not deal with the appellants point of contention.

4. Without prejudice, the CIT(A) should have allowed the claim in view of proviso to section 40(ia) inserted by finance act, 2012 which should be treated as clarificatory as it is intended to remove a hardship as decided in respect of similar amendments made to section 43B by Hon'ble Supreme Court in the case of Allied Motors (P) Ltd. Vs. CIT (1997) 224 ITR 677 and CIT Vs. Alom Extrutions Limited (2009) 319 ITR 306.

3. Brief facts relating to above grounds of appeal are that the Assessing Officer during the course of assessment proceedings made a disallowance of interest paid by the assessee at Rs.91,929/- by invoking the Section 40(a)(ia) of the Act for non-deduction of TDS u/s 194A of the Act. Aggrieved, assessee preferred appeal before CIT(A).

4. Before CIT(A), assessee argued that the loan was taken by the assessee in his individual capacity and the same was invested in the proprietary concern as ÷capitalø According to him, the provisions of TDS u/s 194A of the Act will not apply. Further, the assessee also placed reliance on CBDT Instruction No.275/201/95-IT(B) dated 29.01.1997, which was approved by Hon'ble Supreme Court in the case of *Hindustan Coca Cola Beverages (P) Ltd.* (2007) 293 ITR 226 (SC) that the assessee cannot be forced to deduct TDS if there is no tax liability in the hands of loan creditors. Ld. counsel for the assessee also argued that in view of the second proviso to Sec. 40(a)(ia) of the Act as inserted by the Finance Act 2012 with effect from 1-4-2013, which is retrospective, the assessee is not liable to deduct TDS. But the CIT(A) confirmed the action of the AO vide para 3.3 and 3.4 as under:-

"3.3 Appellant's submission and facts available on record is carefully considered. In the present case assessee was a transporter having turnover more than 40 lakhs. In the profit and loss account interest expenditure of Rs.98,878/- has been claimed. Out of this no tax was deducted on Rs.91,928/-. Assessee plea that the loan was taken in individual capacity is without any basis as the interest has claimed as expenditure in profit and loss account for his business, which the AO sought to disallow as per provision of 40(a)(ia), as no tax was deducted as per section 194A. Had the loan being taken in individual capacity for non-business purposes, no expenditure could have been claimed for interest paid on such loan.

3.4 As regards assessee's other plea that no tax could be deducted, as the recipient of interest has paid tax on interest received, no such evidence of payment of tax by the recipient was produced.

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> *Appellant's submissions that as tax was paid by persons directly on receipts, where tax was not deducted, placing reliance on decision of the Hon'ble Supreme Court in the case of* Hindustan Coca Cola Beverage (P) Ltd. vs. CIT *293 ITR 226 (2007) is misplaced, as Section 40(a)(ia) has distinctive provisions, to ensure implementation of TDS provisions is scrupulously implemented to ensure that at one point at least recovery of tax is ensured. The relevant portion of the judgment of the Hon'ble High Court of Madras in the case of* Tube Investment of India Ltd. vs. ACIT *[2010] 325 ITR 610 (Mad.) is quoted as under:*
> ... .
>
> *In view of the above, it is held that AO had correctly disallowed interest expense claimed, due to non-deduction of tax u/s. 194A as per the provisions of section 40(a)(ia) of the IT Act. The appeal made on this ground is **dismissed**."*

Aggrieved, assessee preferred second appeal before Tribunal.

5. I have heard rival contentions and gone through the facts and circumstances of the case. I find from first argument made by Ld. counsel for the assessee that the second proviso to section 40(a)(ia) of the Act inserted by the Finance Act, 2012 would apply in the instant case. According to him, the second proviso is curative in nature intended to supply an obvious omission, take care of an unintended consequence and make the section workable. Section 40(a)(ia) without the second proviso resulted in the unintended consequence of disallowance of legitimate business expenditure even in a case where the payee in receipt of the income had paid tax. According to him, it has for long been the legal position that if the payee has paid tax on his income, no recovery of any tax can be made from the person who had failed to deduct the income tax at source from such amount. In *Grindlays Bank v CIT*, (1992) 193 ITR 457 (Cal) decided on September 5, 1989, it was held by the Hon'ble Calcutta High Court as follows at pages 469-470 of the reports:

> *"A point has been made by the assessee that as a result of this deduction the department is realizing the tax twice on the same income. It does not appear that this point was agitated before the Tribunal. We, however, make it clear that if the amount of tax has already been realised from the employees concerned directly, there cannot be any question of further realisation of tax as the same income cannot be taxed twice. If the tax has been realised once, it cannot be realised once again, but that does not mean that the assessee will not be liable for payment of interest or any other legal consequence for their failure to deduct or to pay tax in accordance with law to the revenue." (emphasis supplied)*

That such was the legal position was accepted by the Central Board of Direct Taxes in its Circular No.275/201/95-IT(B) dated January 29, 1997. Reference in this behalf may also be made to the judgment of the Hon'ble Supreme Court in *Hindustan Coca Cola Beverage P. Ltd. v CIT*, (2007) 293 ITR 226 (SC) where the same view was taken. I find

that the aforesaid settled position in law has also been legislatively recognized by insertion of a proviso in sub-section (1) of section 201 of the Act by the Finance Act, 2012. Thus, the settled position in law is that if the deductee/payee has paid the tax, no recovery can be made from the person responsible for paying of income from which he failed to deduct tax at source. In a case where the deductee/payee has paid the tax on such income, the person responsible for paying the income is no longer required to deduct or deposit any tax at source. In the similar circumstances, I find that the first proviso to section 40(a)(ia) inserted by the Finance Act, 2010, which has been held to be curative and therefore, retrospective in its operation by the Hon'ble Calcutta High Court in ITAT No. 302 of 2011, **GA 3200/2011**, *CIT v Virgin Creations* decided on November 23, 2011 provides for allowance of the expenditure in any subsequent year in which tax has been deducted and deposited. The intention of the legislature clearly is not to disallow legitimate business expenditure. The allowance of such expenditure is sought to be made subject to deduction and payment of tax at source. However, in a case where the deductee/payee has paid tax and as such the person responsible for paying is no longer required to deduct or pay any tax, legitimate business expenditure would stand disallowed since the situation contemplated by the first proviso viz. deduction and payment of tax in a subsequent year would never come about. Such unintended consequence has been sought to be taken care of by the second proviso inserted in section 40(a)(ia) by the Finance Act, 2012. There can be no doubt that the second proviso was inserted to supply an obvious omission and make the section workable. The insertion of second proviso was explained by Memorandum Explaining The provision in Finance Bill, 2012, reported in 342 ITR (Statutes)234 at 260 & 261, which reads as under:-

> *"E.RATIONALIZATION OF TAX DEDUCTION AT SOURCE (TDS) AND TAX COLLECTION AT SOURCE (TCS) PROVISIONS*
>
> *I.* ***Deemed date of payment of tax by the resident payee****.*
>
> *Under the existing provisions of Chapter XVII-B of the Income-tax Act, a person is required to deduct tax on certain specified payments at the specified rates if the payment exceeds specified threshold. In case of non-deduction of tax in accordance with the provisions of this Chapter, he is deemed to be an assessee in default under section 201(1) in respect of the amount of such non-deduction.*
> *However, section 191 of the Act provides that a person shall be deemed to be assessee in default in respect of non/short deduction of tax only in cases where the payee has also failed to pay the tax directly. Therefore, the deductor cannot be*

treated as assessee in default in respect of non/short deduction of tax if the payee has discharged his tax liability.

The payer is liable to pay interest under section 201(1A) on the amount of non/short deduction of tax from the date on which such tax was deductible to the date on which the payee has discharged his tax liability directly.

As there is no one-to-one correlation between the tax to be deducted by the payer and the tax paid by the payee, there is lack of clarity as to when it can be said that payer has paid the taxes directly. Also, there is no clarity on the issue of the cut-off date, i.e., the date on which it can be said that the payee has discharged his tax liability.

In order to provide clarity regarding discharge of tax liability by the resident payee on payment of any sum received by him without deduction of tax, it proposed to amend section 201 to provide that the payer who fails to deduct the whole or any part of the tax on the payment made to a resident payee shall not be deemed to be an assessee in dealt in respect of such tax if such resident payee-

- *(i) Has furnished his return of income under section 139 ;*
- *(ii) Has taken into account such sum for computing income in such return of income ; and*
- *(iii) Has paid the tax due on the income declared by him in such return of income, and the payer furnishes a certificate to this effect from an accountant in such form as may e prescribed.*

The date of payment of taxes by the resident payee shall be deemed to be the date on which return has been furnished by the payer.

It is also proposed to provide that where the payer fails to deduct the whole or any part of the tax on the payment made to a resident and is not deemed to be an assessee in default under section 201(1) on account of payment of taxes by the such resident, the interest under section 201(1A)(i) shall be payable from the date on which such tax was deductible to the date of furnishing of return of income by such resident payee.

Amendments on similar lines are also proposed to be made in the provisions of section 206C relating to TCS for clarifying the deemed date of discharge of tax liability by the buyer or lincensee or lessee.
These amendments will take effect from 1st July, 2012.

II. Disallowance of business expenditure on account of non-deduction of tax on payment to resident payee.

A related issue to the above is the disallowance under section 40(a)(ia) of certain business expenditure like interest, commission, brokerage, professional fee, etc. due to non-deduction of tax. It has been provided that in case the tax is deducted in subsequent previous year, the expenditure shall be allowed in that subsequent previous year of deduction

In order to rationalize the provisions of disallowance on account of non-deduction of tax from the payments made to a resident payee, it is proposed to amend section 40(a)(ia) to provide that where an assessee makes payment of the nature specified in the said section to a resident payee without deduction of tax and is not deemed

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to be an assessee in default under section 201(1) on account of payment of taxes by the payee, the, for the purpose of allowing deduction of such sum, it shall be deemed that the assessee had deducted and paid the tax on such sum on the date of furnishing of return of income by the resident payee.

These beneficial provisions are proposed to be applicable only in the case of resident payee.

These amendments will take effect from 1st April, 2013 and will, accordingly, apply in relation to the assessment year 2013-14 and subsequent assessment years."

6. That curative amendments have retrospective operation is the settled position in law. Reliance in this behalf is placed on the judgments of the Hon'ble Supreme Court in Allied Motors (P) Ltd. v. CIT, (1997) 224 ITR 677 (SC) and CIT v. Alom Extrusions, (2009) 319 ITR 466 (SC). Hon'ble Supreme Court in the case of Allied Motors (P) Ltd. (supra) held that the first proviso, which was inserted w.e.f. 01.04.1988 by the Finance Act, 1987 is remedial in nature, designed to eliminate unintended consequences which may cause undue hardship to the assessee and which made the provision unworkable or unjust in a specific situation. Hon'ble Supreme Court held as under:

"Section 43B was, therefore, clearly aimed at curbing the activities of those taxpayers, who did not discharge their statutory liability of payment of excise duty, employer's contribution to provident fund, etc., for long periods of time but claimed deductions in that regard from their income on the ground that the liability to pay these amounts had been incurred by them in the relevant previous year. It was to stop this mischief that section 43B was inserted. It was clearly not realised that the language in which section 43B was worded, would cause hardship to those taxpayers who had paid sales tax within the statutory period prescribed for this payment, although the payment so made by them did not fall in the relevant previous year. This was because the sales tax collected pertained to the last quarter of the relevant accounting year. It could be paid only in the next quarter which fell in the next accounting year. Therefore, even when the sales tax had in fact been paid by the assessee within the statutory period prescribed for its payment and prior to the filing of the income tax return, these assessees were unwittingly prevented from claiming a legitimate deduction in respect of the tax paid by them. This was not intended by section 43B. Hence, the first proviso was inserted in section 43B. The amendment which was made by the Finance Act of 1987 in section 43B by inserting, inter alia, the first proviso, was remedial in nature, designed to eliminate unintended consequences which may cause undue hardship to the assessee and which made the provision unworkable or unjust in a specific situation."

7. Recently, Hon'ble Supreme Court in the case of CIT v. Vatika Township P. Ltd., (2014) 367 ITR 466 (SC) has held as under:

"We would also like to point out, for the sake of completeness, that where a benefit is conferred by a legislation, the rule against retrospective construction is different. If a legislation confers a benefit on some persons but without inflicting a corresponding detriment on some other person or on the public generally, and where to confer such benefit appears to have been the legislators object, then the presumption would be that

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such a legislation, giving it a purposive construction, would warrant it to be given a retrospective effect. This exactly is the justification to treat procedural provisions as retrospective. In Government of India v. Indian Tobaco Association, the doctrine of fairness was held to be relevant factor to construe a statute conferring a benefit, in the context of it to be given a retrospective operation. The same doctrine of fairness, to hold that a statute was retrospective in nature, was applied in the case of Vijay v. State of Maharashtra. It was held that where a law is enacted for the benefit of community as a whole, even in the absence of a provision the statute may be held to be retrospective in nature. However, we are confronted with any such situation here.

In such cases, retrospectively is attached to benefit the persons in contradistinction to the provision imposing some burden or liability where the presumption attaches towards prospectivity. In the instant case, the proviso added to section 113 of the Act is not beneficial to the assessee. On the contrary, it is a provision which is onerous to the assessee. Therefore, in a case like this, we have to proceed with the normal rule of presumption against retrospective operation. Thus, the rule against retrospective operation is a fundamental rule of law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act or arises by necessary and distinct implication. Dogmatically framed, the rule is no more than a presumption, and thus could be displaced by out weighing factors.

I find that the Hon'ble Supreme Court interpreted the retrospectivity that an amendment made to a taxing statute can be said to be intended to remove ÷hardshipsø only of the assessee, not of the Department. Where benefit is conferred by legislation, the rule against retrospective construction is different. If legislation confers a benefit on some persons but without inflicting a corresponding detriment on some other person or on the public generally, and where to confer such benefit appears to have been the legislators object, then the presumption would be that such a legislation, giving it a purposive construction, would warrant it to be given a retrospective effect. This exactly is the justification to treat procedural provisions as retrospective. According to Hon'ble Supreme Court, where a law is enacted for the benefit of community as a whole, even in the absence of a provision the statute may be held to be retrospective in nature. Similarly, as argued by Ld. counsel for the assessee in the present case before me, that the insertion of 2nd proviso by the Finance Act, 2012 is remedial in nature, designed to eliminate unintended consequences which may cause undue hardship to the assessee.

8. Further, Special Bench of this Tribunal in Bharti Auto Products v. CIT, (2013) 145 ITD 1 recently held the first proviso inserted in section 206C (6A) with effect from July 1, 2012 similar to the proviso inserted in section 201(1) was retrospective in its operation. Further, in Rajeev Kumar Agarwal v Addl. CIT (2014) 149 ITD 363, Agra

Bench of this Tribunal has taken the view that the second proviso to section 40(a)(ia) is declaratory and curative in nature and has retrospective effect from April 1, 2005 when sub-clause (ia) was inserted in section 40(a) of the Act. But the question whether second proviso to section 40(a))(ia) of the Act was curative did not fall for consideration of the Hon'ble Calcutta High Court in CIT v. Crescent Exports Syndicate (2013) 216 taxman 258 (Cal). In that case the following submission was made on behalf of one of the assessees:-

> *"5. Ms. Roy Chowdhury, learned Advocate appearing for the assessee-respondent in ITAT No. 20 of 2013 reiterated the reasons advanced by the Special Bench in the case of Merilyn Shipping & Transports which we have already noticed. She added that if the proviso is taken into account, it would lead to the only conclusion that the main provision contained in Clause (ia) relates to a case where the payment is outstanding. She submitted that there is a possibility of double jeopardy in the event it is held that Clause (ia) is also applicable to those cases where the money has already been paid. She developed her submission by citing an example. Take for instance that a sum of Rs.100 was paid on account of professional fees without deducting TDS. The aforesaid expenditure shall not in that case be allowed to be deducted. The recipient of the aforesaid sum of Rs.100 may have offered the same for taxation. Therefore, the income in the hands of the recipient has been taxed but the payer did not get the benefit thereof. She concluded by submitting that a second proviso to Clause (ia) is intended to become effective from 1st April, 2013 which was enacted to lessen the rigour of Clause (ia) which provides as follows:*
>
> ÷The following second proviso shall be inserted in sub-clause (ia) of clause (a) of section 40 by the Finance Act, 2012, w.e.f. 1.4.2013:
>
> ***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.ø*
>
> 6. She submitted that considering that the legislature was not in favour of creating undue hardship for an assessee, Clause (ia) should only be construed to apply to those cases where the payment is outstanding.ö
>
> (emphasis supplied)

The aforesaid submission was dealt with in paragraph 21 of the judgment as follows:

> *".... A few words are now necessary to deal with the submission of Mr. Bagchi and Ms. Roychowdhuri. There can be no denial that the provision in question is harsh. But that is no ground to read the same in a manner which was not intended by the legislature. This is our answer to the submission of Mr. Bagchi. The submission of Ms. Roychowdhuri that the second proviso sought to become effective from 1st April, 2013 should be held to have already become operative prior to the appointed date cannot also be acceded to for the same reason indicated above. The law was deliberately made harsh to secure compliance*

> *of the provisions requiring deductions of tax at source. It is not the case of an inadvertent error."(emphasis supplied)*

Further, Hon'ble jurisdictional High Court in the case of *Commissioner of Income Tax v. M/s Peerless Hospitex Hospital and Research Centre Ltd.* in Tax Appeal No.126 of 2013 GA No. 4361 of 2013 dated 30-04-2014, wherein the Hon'ble jurisdictional High Court has held:-

> *"Mr. Bagchi's second submission was that the Supreme Court in the case of* Allied Motors (P) Ltd., vs. CIT, *reported in 224 ITR 677, held that when any provision in a statute is introduced by way of a curative measure, the provision should be held to have a retrospective effect. He submitted that the same view was reiterated by the Apex Court in the case of* CIT vs. Alom Extrusions Ltd., *reported in 319 ITR 306. He added that the second proviso to Section 40(a)(ia) is certainly intended to lessen the rigour of Section 40(a)(ia) in a case where the assessee is not deemed to be an assessee in default. There is no factual background before us on the basis of which it can be said that it was ever the contention of the assessee that he could not in this case be considered as an assessee in default. Therefore, the case of the assessee does not even come within the second proviso introduced with effect from 1st April 2013.*
>
> ***We, as such, have no occasion to consider whether the aforesaid proviso is retrospective or can be held to be retrospective*** *The contentions advanced by Mr. Bagchi are all without any merit and are, therefore, rejected. The orders of the learned Tribunal and CIT(A), being patently contrary to the law views expressed by this court indicated above, are set aside."*

From the above, judgment of the Hon'ble jurisdictional High Court in the case of *Peerlees Hospitax Hospital and Research Centre Ltd. Kolkata* (supra) it is clear that Hon'ble jurisdictional High Court has not considered that the second proviso to Sec. 40(a)(ia) of the Act as inserted by the Finance Act, 2012 is retrospective or prospective.

9. It would thus appear that no submission was made before Hon'ble Calcutta High Court that the second proviso was curative or retrospective in operation. On the other hand, submission was that the second proviso effective from April 1, 2013 went to show that the legislature was not in favour of creating undue hardship for assessee and that clause (ia) should not be construed as creating such hardship. The said limited submission of the assessee was dealt with by the Hon'ble High Court in paragraph 21of its judgment. The question before Hon'ble Calcutta High Court was as to, whether clause (ia) only applied to amount outstanding at the end of the year and not in respect of payments actually made during the previous year or not? Hon'ble Calcutta High Court was pleased to hold that clause (ia) was applicable not only in respect to outstanding

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amounts but also amounts paid. In deciding the said controversy, the Hon'ble Calcutta High Court was pleased to reject the submission on behalf of the assessee that the object behind the insertion of the second proviso with effect from April 1, 2013 should also guide the interpretation of the parent clause (ia). It was argued by Ld. counsel for the assessee that the observations of the Hon'ble High Court in paragraph 21 of its judgment dealt with the limited argument made on behalf of the assessee recorded in paragraphs 5 and 6 of the judgment and cannot be read as deciding the question as to whether the second proviso is curative and clarificatory of the law from its inception. The question whether the second proviso is curative and clarificatory did not arise for consideration in Crescent's case, was not debated before the Hon'ble Calcutta High Court. Hon'ble Supreme Court in the case of In State of Haryana v. Ranbir, (2006) 5 SCC 167, has discussed the concept of the obiter dictum thus:

> *"A decision, it is well settled, is an authority for what it decides and not what can logically be deduced therefrom. The distinction between a dicta and obiter is well known. Obiter dicta is more or less presumably unnecessary to the decision. It may be an expression of a viewpoint or sentiments which has no binding effect."*

10. Secondly, I am of the view that the insertion of second proviso to sec. 40(a)(ia) of the Act is curative and it has retrospective effect w.e.f. 1st April, 2005, being a date from which Sec. 40(a)(ia) of the Act was inserted by the Finance (No. 2) Act, 2004. In view of this, I am of the view that matter needs fresh adjudication in the light of the fact that the AO will carry out necessary verification in regard to related payments having been taken into account by the recipient in computation of its income and verification of payment of taxes in respect of such income and also filing of income tax return by the recipient. In term of the above, the second aspect argued by Ld. counsel is restored back to the file of the AO and assessee will provide all the details in terms of second proviso to sec. 40(a)(ia) of the Act.

11. The next common issue in this appeal of assessee is by way of following ground nos. 5, 6 and 7 that the CIT(A) confirmed the action of AO in making disallowance of Rs.16,235/- out of freight receipt of Rs.81,177/-, disallowance of telephone expenses of Rs.12,543/- out of total telephone expenses of Rs.62,219/- and prior period expenses of Rs.5,238/-, which read as under:-

"5. The C.I.T.(A), under the facts and circumstances, has further erred in confirming disallowance of a sum of Rs.16235/- out of freight receipt shortage of Rs.81177/- merely on surmises and suspicion.

6. The C.I.T.(A), under the facts and circumstances, has further erred in confirming disallowance of a sum of Rs.12543/- out of telephone expenses of Rs.62219/- merely on surmises and suspicion.

7. The C.I.T.(A), under the facts and circumstances, has further erred in confirming disallowance of prior period expenses of Rs.5238/- which was incurred in normal course of business.

12. I have heard rival contentions and gone through the facts and circumstances of the case. I find that the disallowances were made by the AO and confirmed by CIT(A) on the above disallowances @ 20% is excessive. I feel that the disallowances be restricted @ 10% of the expenses. I order accordingly.

13. In the result, the appeal of the assessee is partly allowed.

Sd/-
(Mahavir Singh)
Judicial Member

Dated : 4th March, 2015

Jd.(Sr.P.S.)

Copy of the order forwarded to:

1. APPELLANT ó Shri Santosh Kumar Kedia, gupta Saharia & Co., 8E, Dacres Lane, 3rd floor, Kolkata-700 069.
2 Respondent ó ITO, Ward-56(1), Kolkata.
3. The CIT(A), Kolkata
4. CIT Kolkata
5. DR, Kolkata Benches, Kolkata

/True Copy, By order,

Asstt. Registrar.

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