

**F. No. 279/Misc./M-61/2012-ITJ (Vol.-II)**

**Government of India**

**Ministry of Finance**

**Department of Revenue**

**Central Board of Direct Taxes**

New Delhi, the December 16<sup>th</sup> 2013

**Subject: Circular on Section 40(a)(ia) of the Income Tax Act, 1961-reg.**

It has been brought to the notice of the Board that there are conflicting interpretations by judicial authorities regarding the applicability of the provisions of section 40(a)(ia) of the Income-tax Act, 1961 ('the Act') with regard to the amount not deductible in computing the income chargeable under the head 'Profits and gains of business or profession'.

2. Section 40(a)(ia) of the Act reads as under:

".....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...":

3. In the case of *Merilyn Shipping & Transports v. Addl. CIT*, it was held by Special Bench of ITAT, Vishakhapatnam, that the provisions of section 40(a)(ia) of the Act would apply only to the amount which remained payable at the end of the relevant financial year and could not be invoked to disallow the amount which had actually been paid during the previous year without deduction of tax at source. The order of the Special Bench has since been put under interim suspension by the Andhra Pradesh High Court.

3.1 The Hon'ble Calcutta High Court and Hon'ble Gujarat High Court in the case of *Commissioner of Income-tax, Kolkata-XI v. Crescent Exports Syndicate* and *Commissioner of Income-tax-IV v. Sikandarkhan N Tunvar* respectively, have held that section 40(a)(ia) of the Act would cover not only the amounts which are payable at the end of the previous year but also which are payable at any time during the year.

3.2 The Hon'ble High Courts have further held that the intention of the legislation was to disallow certain types of expense, subject to provisions of Chapter XVII-B, which are payable at any time during the year but no tax was deducted at source or if deducted was not paid within the stipulated time. There is no such condition that amount should remain payable at the end of the year.

3.3 The Hon'ble Allahabad High Court in CIT v. Vector Shipping Service (P) Ltd. has affirmed the decision of the Special Bench in Merilyn Shipping that for disallowance under section 40(a) (ia) of the Act, the amount should be payable and not which has been paid during the year. However, the decisions of the Hon'ble Gujarat and Calcutta High Courts (supra) were not brought to the attention of the Hon'ble Allahabad High Court.

3.4 In the case of ACIT, Circle 4(2), Mumbai v. Rishti Stock and Shares Pvt. Ltd. in ITA No. 112/Mum/2012, Hon'ble ITAT, Mumbai in its order dated 02-08-2013 has examined the decision of the Hon'ble Allahabad High Court (supra) as regards to section 40(a)(ia) of the Act and concluded that the same was an 'orbiter dicta' while the decisions of the Hon'ble Gujarat and Calcutta High Court (supra) were 'ratio decidendi'. The ITAT accordingly applied the view taken by the Hon'ble Gujarat and Calcutta High Court as ratio decidendi prevails over an orbiter dicta.

4. After careful examination of the issue, the Board is of the considered view that the provision of section 40(a) (ia) of the Act would cover not only the amounts which are payable as on 31<sup>st</sup> March of a previous year but also amounts which are payable at any time during the year. The statutory provisions are amply clear and in the context of section 40(a) (ia) of the Act the term "payable" would include "amounts which are paid during the previous year".

5. Where any High Court decides an issue contrary to the 'Departmental View', the 'Departmental View' thereon shall not be operative in the area falling in the jurisdiction of the relevant High Court. However, the CCIT concerned should immediately bring the judgement to the notice of the CTC. The CTC shall examine the said judgement on priority to decide as to whether filing of SLP to the Supreme Court will be adequate response for the time being or some legislative amendment is called for.

6. The above clarification may be brought to the notice of all officers.

  
(Priyanka Singh)

Dy. Commissioner of Income Tax (OSD) (ITJ)

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1. The Chairperson, Members and all other officers of the CBDT of the rank of Under Secretary and above.
2. All Chief Commissioners of Income-tax (CCA) & All Directors General of Income-tax with a request to bring it to the attention of all officers under his/ her Charge.
3. The Director General of Income-tax, NADT, Nagpur.
4. The DGIT (Systems), ARA Centre, Jhandewalan Extension, New Delhi.
5. The DGIT (Vigilance), New Delhi.

6. The Director (PR, PP & OL), Mayur Bhawan, New Delhi for printing in the quarterly tax bulletin and for circulation as per usual mailing list.
7. The Comptroller and Auditor General of India.
8. NIC, M/o Finance for uploading on the Department's website.
9. Guard file.



(Priyanka Singh)

Dy. Commissioner of Income Tax (OSD) (ITJ)