IV. RETROSPECTIVE OVERREACH: THE JUDICIAL UNDERMINING OF PARLIAMENTARY SUPREMACY IN LIGHT OF SECTION 40 (A) (IA) OF THE INCOME TAX ACT, 1961

- Athul Roshal Kumar and Kanika Jain[*]

ABSTRACT

Legal stability forms a cornerstone of the common law system, yet discord among High Courts causes confusion among the public at large regarding certain parts of the law. The problem compounds itself when one narrows their scope to the field of tax law – as predictability of tax becomes paramount. The present study seeks to understand the current position of Section 40(a)(ia) of the Income Tax Act, 1961 which pertains to the non-deduction of certain expenditures while calculating the income of a business and expands into a more holistic analysis of the interpretation of tax statutes. In particular, the present paper focuses on the retrospective application of the second proviso of Section 40(a)(ia) and the possible consequences of such a decision – while exploring the arguments for and against the retrospective application of the provision. Additionally, the present paper scrutinises the six High Court decisions in this regard, and other allied judgements, to gauge the best possible reasoned interpretation of the provision. This dispute has gained contemporary relevance after the Apex Court, in the Shree Choudhary Transport Company case, enunciated that a substantial provision does not warrant retrospective operation merely because it is beneficial in nature. This strikes at the very core of the judgments delivered by various High Courts holding that the second proviso of Section 40(a)(ia) is retrospective in nature. While the appeals against these decisions of the High Courts are pending before the Supreme Court, the authors opine that the Apex Court is likely to hold that the proviso does not have retrospective operation, in light of the recent aforementioned case. The paper concludes with the opinion of the authors regarding the retrospective application of the said section, and tax statutes in general, while also putting forth recommendations that would bring uniformity in the interpretations of

[*] The authors are fourth-year students of B.B.A. LL.B. (Hons.) at Symbiosis Law School, Pune. Views stated in this paper are personal.

tax statutes across the judicial discipline – providing the greater good to the public in the form of enhanced stability of laws.

I. INTRODUCTION

Tax deductions are crucial in incentivising the proliferation of productive businesses as the same lowers the taxable income of persons and thereby reduces the overall tax obligation of an individual or business. The same garners further importance by way of cultivating an entrepreneur-friendly climate as small businesses and start-ups which incur heavy outflows in capital expenditure would not be able to sustain themselves without tax deductions.

In light of the above considerations, Section 30 to 38 of the Income Tax Act, 1961 (**"Act"**) have been inserted – which lay down the business expenditures that are deductible while calculating the taxable income of a

person.[1] Nevertheless, Section 40(a)(ia) disallows certain deductions, provided the assessee fails to deduct the applicable Tax Deductible at Source (**"TDS"**) on the said payment. Section 40(a)(ia), before the 2012 Amendment,[2] laid down that the non-deduction of TDS would disallow the impugned expenditure on which TDS was not withheld in whole – thus increasing the tax liability of the assessee in that assessment year.

To appreciate the rigor of Section 40(a)(ia), it is important to understand the purpose of TDS provisions. The insertion of TDS provisions minimises tax evasion by partially or wholly taxing the income of a person at the time of generation, thus preventing assessees from evading taxes.

Neither the mandatory nature of TDS provisions nor their benefit to the revenue has been contended; however, a cleavage of opinion arises as to the retrospective application of the second proviso to Section 40(a)(ia) (**"Second Proviso"**). The second proviso reads as under:

> "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 payee referred to in the said proviso."[3]

The second proviso, in essence, allows the assessee to claim deductions even where he has not complied with the TDS provisions, provided

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[1] The Income- Tax Act, 1995, No. 43, Acts of Parliament, 1961, § 2(31) [Hereinafter *Income Tax Act, 1961*].
[2] The Finance Act, 2012, No. 23, Acts of Parliament, 2012, § 11 [Hereinafter *Finance Act, 2014*].
[3] Income Tax Act, 1961, § 40(a)(ia).

that the recipient of such income has paid tax on it and fulfilled other conditions laid down under § 201.[4] The conditions that ought to be met by the payee are as follows:

i. has furnished his return of income under Section 139;

ii. has taken into account the sum on which TDS was not deducted while computing his income;

iii. has paid, in whole, the tax due on the income so declared; and

iv. has furnished a certificate to this effect from an accountant to the assessee as prescribed under Rule 31ACB.[5]

Although the Amending act, i.e., the Finance Act, 2012, states that the second proviso shall come into effect from April 1, 2013, that same has been contested in several High Courts for the grant of retrospective application.

A. Present Judicial Stance

The absence of a Supreme Court decision is the primary cause of deviations between various High Court decisions concerning the second proviso. The Kerala High Court[6] is the sole constitutional court that has ruled in favour of the revenue in the present contention, i.e., against retrospective application of the second proviso whereas the Delhi,[7] Allahabad,[8] Bombay,[9]

[4] Income Tax Act, 1961, § 201.
[5] Income Tax Rules (1962), GOVT. OF INDIA, Rule 31 ACB.
[6] Thomas George Muthoot v. CIT, (2016) 287 CTR (Ker) 101.
[7] CIT v. Ansal Landmark Township, (2015) 279 CTR 384.
[8] Commissioner of Income Tax v. Manoj Kumar Singh, (2014) 44 taxmann.com 362 (Allahabad).
[9] Perfect Circle India Ltd v. Assistant Commissioner of Income Tax, (2020) 423 ITR65 (Bombay).

Calcutta,[10] and the Punjab and Haryana High Court[11] have adjudicated the matter in favour of the assessee.

The Courts that have adjudicated the matter in the favour of the assessees[12] have observed that the insertion of the second proviso was curative and declaratory in nature as the same sought to cure unintended hardships caused by the language of Section 40(a)(ia) before the 2012 Amendment. These hardships include disallowance of business expenditure even where the tax had been paid by the recipient and the purpose of the provision was satisfied, *de facto*.

On the other hand, the Hon'ble Kerala High Court had ruled in favour of the revenue[13] as the second proviso conferred an additional benefit on the assessees and did not cure any unintended hardships, favouring prospective application in consonance with the literal interpretation of the statute. It is pertinent to note that the decisions given by the Delhi High Court and the Kerala High Court are already in appeal before the Hon'ble Apex Court and await a hearing.[14]

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[10] Commissioner of Income Tax v. S. K. Tekriwal, (2014) 46 taxmann.com 444 (Calcutta).
[11] Commissioner of Income Tax v. Shivpal Singh Chaudhary, (2018) 409 ITR 87 (Punjab and Haryana).
[12] CIT v. Ansal Landmark Township, (2015) 279 CTR 384; Commissioner of Income Tax v. Manoj Kumar Singh, (2014) 44 taxmann.com 362 (Allahabad), Perfect Circle India Ltd v. Assistant Commissioner of Income Tax, (2020) 423 ITR65 (Bombay); Commissioner of Income Tax v. S. K. Tekriwal, (2014) 46 taxmann.com 444 (Calcutta); Commissioner of Income Tax v. Shivpal Singh Chaudhary, (2018) 409 ITR 87 (Punjab and Haryana).
[13] Thomas George Muthoot v. CIT, (2016) 287 CTR (Ker) 101.
[14] Commissioner of Income-tax-1 v. Ansal Landmark Township (P.) Ltd., (2016) 73 taxmann.com 63 (SC); Principal Commissioner of Income-tax-6 v. Noida Software Technology Park Ltd., (2020) 113 taxmann.com 145 (SC); Principal Commissioner of Income-tax-8, Delhi v. Shivaai Industries (P.) Ltd., (2020) 113 taxmann.com 166 (SC); Thomas Muthoot v. Commissioner of Income-tax, (2020) 120 taxmann.com 317 (SC).

However, in the recent judgment of *Shree Choudhary Transport Company*,[15] the Hon'ble Supreme Court has conferred prospective operation to the 2014 Amendment[16] to Section 40(a)(ia) which restricted the amount of disallowance to 30% in case of failure to withhold or deposit tax at source.

In this article, the authors seek to put forth the stance that the decisions of Delhi,[17] Allahabad,[18] Bombay,[19] Calcutta,[20] and the Punjab and Haryana High Court,[21] holding that the second proviso is retrospective in nature and need to be revisited especially in light of the *Shree Choudhary Transport* judgement. The authors first establish that the second proviso must be presumed to be prospective in nature, and second, that it must be interpreted strictly due to its unambiguous language, and finally, the authors establish that the proviso is not curative or declaratory in nature.

II. PRESUMPTION IN FAVOUR OF THE PROSPECTIVE APPLICATION

The Hon'ble Apex Court has at multiple occasions held that the law must be presumed to be prospective in nature unless it has been given retrospective effect by the legislature either expressly or by necessary

[15] Shree Chaudhary Transport Company v. Income Tax Officer, [2020] 118 taxmann.com 47 (SC).
[16] Finance Act, 2014, § 14.
[17] CIT v. Ansal Landmark Township, (2015) 279 CTR 384.
[18] Commissioner of Income Tax v. Manoj Kumar Singh, (2014) 44 taxmann.com 362 (Allahabad).
[19] Perfect Circle India Ltd v. Assistant Commissioner of Income Tax, (2020) 423 ITR65 (Bombay).
[20] Commissioner of Income Tax v. S. K. Tekriwal, (2014) 46 taxmann.com 444 (Calcutta).
[21] Commissioner of Income Tax v. Shivpal Singh Chaudhary, (2018) 409 ITR 87 (Punjab and Haryana).

implication.[22] This position was reiterated by the Hon'ble Court in the recent decision of *CIT v. Vatika Township Pvt. Ltd*.[23]

The Apex Court, while relying upon *Phillips v. Eyre*,[24] elucidated in this case that the rule against the retrospective application is based on the imperative principle of fairness, since the law looks forward and not backward.[25] Hence, the Court should consider whether conferring retrospective application to a provision would defeat the reasonable expectations of those who are affected by it.

In furtherance of the principle of presumption of prospective application, a provision cannot be given effect retrospectively unless the statute declares the same in clear and unambiguous words, or when the amended provision is declaratory in nature.[26] Hence, the legislative intent behind the provision to operate retrospectively should be evident from its language and if the court is not satisfied with the same, it must give prospective application to that provision.[27]

Presently, as discussed in further detail later, the language employed by the Parliament for introducing the second proviso neither confers

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[22] Gem Granites v. CIT, (2005) 1 SCC 289; Shyam Kumar v. Ram Kumar, (2001) 8 SCC 24; Keshavan Madhava Menon v. State of Bombay, (1951) AIR 1951 SC 128; ITO v. Kajaria Investment & Properties (P.) Ltd., (2008) 297 ITR 45; Union of India v. Madan Gopal Kabra, (1954) AIR 1954 SC 158; Govinddas v. Income Tax Officer, (1976) 1 SCC 906; CIT Bombay v. Scindia Steam Navigation Co. Ltd., (1962) 1 SCR 788; Hitendra Vishnu Thakur v. State of Maharashtra, (1994) AIR 1994 S.C. 2632.

[23] CIT v. Vatika Township Pvt. Ltd., (2014) 367 ITR 466.

[24] Phillips v. Eyre, (1870) LR 6 QB 1; Government of India v. Indian Tobacco Association, (2005) 7 SCC 396.

[25] L'Office Cherifien des Phosphates v. Yamashita Shinnihon Steamship Co. Ltd., (1994) 1 AC 486.

[26] Saurastra Agencies (P.) Ltd. v. Union of India, (1990) 186 ITR 634.

[27] Associated Industries v. First Income-tax Officer (1982) 134 ITR 565.

retrospective application to it nor does it necessarily implies the same. Therefore, the Courts should have presumed the proviso to be prospective in its application.

A. The Second Proviso is Substantive in Nature

The presumption against the retrospective application is not applicable when the law in question is procedural in nature since it does not affect any existing rights and liabilities of the parties. Therefore, the presumption in favour of the prospective application of the second proviso will only stand as long as it is not procedural in nature. Procedural laws are those which do not affect any vested rights of a person, contrary to substantive laws which relate to an issue of substance and affect the rights, duties, and power of the parties. In its decision in the case titled *Hitendra Vishnu Thakur v. State of Maharashtra,*[28] the Hon'ble Apex Court elucidated that any statute dealing with the procedure should be construed as retrospective in nature.[29] Hence, its provisions shall apply to the proceedings which are pending at the time of its enactment.

Regarding fiscal statutes as well, if the amendment is purely procedural and merely affects the machinery for collecting the tax rather than the tax itself, it may operate retrospectively.[30] A tax provision is considered to be procedural in nature if its terms do not take away or impair any existing right, create any new obligation, or enforce a fresh levy than as regards matters

[28] Hitendra Vishnu Thakur v. State of Maharashtra, (1994) AIR 1994 S.C. 2632.
[29] Hitendra Vishnu Thakur v. State of Maharashtra, (1994) AIR 1994 S.C. 2632; P. Ram Gopal Varma v. Dy. CIT (Assessment), (2013) 357 ITR 493.
[30] CIT v. Mela Ram Jagdish Raj & Co., (1981) 132 ITR 897; Veerbhandas Purswani v. CWT, (1985) 154 ITR 128; Kanumarlapudi L. Chetty v. First Addl. ITO, (1957) AIR 1957 AP 159.

of procedure.[31] It is an established position that provisions dealing with, *inter alia,* what will be taxed, what should not be taxed, and what amounts can be deducted while computation of taxable income, fall within the paradigm of substantive law, as has been elucidated by the Hon'ble Delhi High Court in the *National Agrl. Co-operative Marketing Federation of India Ltd.* case.[32]

The insertion of the second proviso lowers the tax liability of the assessee provided that the recipient of the income had complied with the provisions of the first proviso to Section 201(1) – thereby, substantially affecting the taxable income of the former. Therefore, the remedy against disallowance under the second proviso cannot be deemed as procedural law.

Furthermore, a two-fold test in the light of Hohfeldian analysis of rights would shed light on the substantial nature of the right bestowed on the assessee under the second proviso to Section 40(a)(ia); Hohfeldian analysis of rights is a system that identifies jural relations by distinguishing the correlative and the opposites of the rights therein.

In the aftermath of the amendment to Section 40(a)(ia), the assessee is granted a benefit of not being treated as an 'assessee in default'; as a result, there exists an accompanying duty on the department not to treat him as an assessee in default.[33] Secondly, the assessee can claim as a matter of right not to be treated as an assessee in default under Section 201, thereby taking away the department's claim to such deduction which was earlier permissible.

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[31] New Shorrock Spinning & Manufacturing Co. Ltd. v. N. V. Raval, (1959) AIR 1959 Bom 477; JUSTICE G.P. SINGH, PRINCIPLES OF STATUTORY INTERPRETATION (13th ed., 2012).
[32] CIT v. National Agrl. Co-operative Marketing Federation of India Ltd., (1999) 236 ITR 766; CIT v. Assam Frontier Tea Ltd., (1997) 224 ITR 398.
[33] HURD, MOORE & MICHAEL, THE HOHFELDIAN ANALYSIS OF RIGHTS, (University of Illinois College of Law Legal Studies, 2018).

Therefore, it is evident that since the proviso is conferring a new right on the assessee, which was previously disallowed, it is substantive in nature and the presumption must stand in favour of its prospective application.

III. THE DOCTRINE OF LITERAL INTERPRETATION

The doctrine of literal interpretation is one of the oldest and simplest rules of interpretation of statutes. It is the most commonly employed tool for interpretation when the language of an Act is unambiguous. This doctrine is the premise of the cardinal principle that while interpreting fiscal statutes, the courts must strictly refer to the language of the statute, without adding or subtracting words from it.[34] This principle is an implication of the general rule that the court can pronounce the judgement, but not write the law.

To elaborate further on this proposition in the light of the Separation of Powers model, the role of the judiciary is to interpret the provisions to bring out the intention of the legislature. However, if the intention of the legislature is already expressly stated through the unambiguous language of the provision, the same does not require any further elaboration, limiting the role of the courts.[35] Hence, unless the amended provision is given retrospective effect by the legislature either expressly or by necessary implication, the court cannot interfere with the same and confer retrospective application to that provision.[36]

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[34] Sangeeta Singh v. Union of India, (2005) 7 SCC 484; CIT v. Calcutta Knitwears, (2014) 362 ITR 673; Grasim Industries Ltd. v. Collector of Customs, (2002) JT (3) SC 555.
[35] State of Kerala v. M.K. Agrotech Pvt. Ltd., (2017) 16 SCC 210.
[36] J.K. Synthetics Ltd. v. CTO, (1994) 119 CTR (SC) 222; CWT v. Varadharaja Theatre Pvt. Ltd., (2001) 250 ITR 523 (Mad.).

Coming back to the retrospective operation of the second proviso, it must be noted that the language employed in the provision, the Memorandum explaining the same,[37] and the Notes on Clauses[38] attached to the 2012 Finance Bill do not imply in any manner that the proviso is to be given retrospective effect. At the cost of reiteration, the proviso was inserted by the Finance Act, 2012, and came into effect from April 1, 2013. The Act explicitly states that the amendment comes into force on April 1, 2013, which strengthens the argument that the legislature had intended the same to be prospective in nature. The specific date prescribed for giving effect to the proviso entails that any other interpretation enabling retrospective effect shall be contrary to the intention of the legislature.

The relevant portion of the Finance Act, 2012 read as under:

> **Amendment of Section 40.**
>
> **11.** In Section 40 of the Income-tax Act, in clause (a), in sub-clause (ia), after the proviso and before the Explanation, the following proviso shall be inserted with effect from the 1st day of April, 2013…[39]

Moreover, even the Memorandum explaining the Finance Act, 2012[40] does not imply that the proviso has retrospective application. It reads as under:

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

[37] Explanatory Memorandum, Finance Bill 2012 (Cent.) 11.
[38] Finance Bill, 2012, Notes on Clauses.
[39] Explanatory Memorandum, Finance Bill 2012 (Cent.) 11.
[40] Explanatory Memorandum, Finance Bill 2012 (Cent.) 11.

> …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.

Lastly, the Notes on Clauses attached with the Finance Act, 2012[41] explicitly mention that the above proviso would come into operation on April 1, 2013. It reads as under:

> **Clause 11 of the Bill seeks to amend Section 40 of the Income-tax Act relating to amounts not deductible.**
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> …This amendment will take effect from 1st April, 2013 and will, accordingly, apply in relation to the assessment year 2013-2014 and subsequent assessment years.

Since all the material cited above mentions that the second proviso of Section 40(a)(ia) will come into operation from April 1, 2013, and apply from the assessment year 2013-14, the proviso cannot be conferred retrospective application by the Courts against the patent intention of the legislation.

A. Rationalization of the Effect of Section 191

Under the provisions of Chapter XVII-B of the Act, a person was required to deduct tax on certain specified payments at the specified rates if the payment exceeded the specified threshold.[42] In case of non-deduction of such tax under 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 an assessee in default in respect of non-deduction of tax only in

[41] Finance Bill, 2012, Notes on Clauses.
[42] Income Tax Act, 1961, § 190.

cases where the payee has also failed to pay the tax.[43] Consequently, the deductor ought not to be treated as an assessee in default provided the payee has discharged his/her tax liability. *Id est* if tax has already been paid by the recipient on income, it is not justified to recover tax on the said amount in the light of the provisions of Section 191 wherein the legislature has provided for collection of tax directly from the recipient.[44] This rift between the allowance of tax payment in Section 191 and disallowance in Section 40(a)(ia) is clarified by the addition of the second proviso of Section 40(a)(ia); however, this line of thought fails to account for a crucial component, i.e., the explanation to Section 191 and Section 201 is different from one another.

The former explicitly states that the deductor shall be deemed to be an assessee-in-default where the assessee has also failed to pay such tax directly, whereas, in Section 201(1), the above condition is not mentioned. This express omission by the legislature bars interpretation of Section 191 in conjunction with Section 201 – barring the effect of the former. Re-emphasizing on the literal rule of interpretation provides the same conclusion as arrived at by the author, i.e., the second proviso to Section 40(a)(ia) shall only be applied prospectively from the date specified in the Finance Act, 2012.

IV. SECOND PROVISO IS NOT CURATIVE/DECLARATORY IN NATURE

It is an accepted rule of interpretation that all legislations are deemed to be prospective unless the same is expressly, or by necessary implication, conferred retrospective application. Generally, it is the role of the judiciary to

[43] Income Tax Act, 1961, § 191.
[44] ITO v. Manav. Greys Exim Pvt Ltd, (2002) 75 TTJ 115.

gauge the legislative intent regarding the prospective or retrospective application of a provision by referring to its overt language. Nevertheless, at times the overt language of certain provisions fails to clarify the legislative intent. In such a scenario, a subsequent clarificatory or explanatory amendment may be promulgated to clarify the real intention of the legislature regarding the earlier provision – which could be given retrospective operation.[45]

A. Definition

Black's Law Dictionary defines a curative statute as, "[an] act that corrects an error in a statute's original enactment, an error that interferes with interpreting or applying the statute."[46] Curative statutes are also known as remedial statutes; which is defined as, "A law that affords a remedy."[47]

Whereas the Black's Law dictionary defines a declaratory statute as, "[a] law enacted to clarify prior law by reconciling conflicting judicial decisions or by explaining the meaning of a prior statute." A declaratory statute is also known as an 'expository statute'. The Hon'ble Apex Court has defined declaratory provisions as those provisions which seek to remove doubts existing as to the common law or meaning or effect of any statute.[48] In a nutshell, a declaratory act also referred to as an explanatory act, is one that

[45] Bharathi Shipyard v. DCIT, (2011) 132 ITD 53 (Mumbai).
[46] *Curative Statute Definition*, Black's Law Dictionary (9th ed. 2009).
[47] *Remedial Statute Definition*, Black's Law Dictionary (9th ed. 2009).
[48] CRAIES, STATUTE LAW (7th ed, 1971) 58; Central Bank of India v. Their Workmen, (1960) AIR 1960 SC 12; Jones v. Bennet, (1890) 63 LT 705; Madras Marine & Co. v. State of Madras, (1986) 3 SCC 552; Satnam Overseas (Export) v. State of Haryana, (2003) AIR 2003 SC 66.

is promulgated to supply an overt oversight or to resolve any doubts regarding the meaning of the unamended Act.[49]

B. Curative and Declaratory Amendments

In the present case, the second proviso of Section 40(a)(ia) creates a new exception for cases where disallowance under said Section will not be applicable. It does not seek to further explain the language or operation of the Section to clarify doubts arising from it. Instead, a new right to claim the inapplicability of disallowance under the Section is created by the second proviso.[50]

1. The Legislature did not Intend to Confer Retrospective Operation to the Second Proviso

It is pertinent to note that a provision may be given retrospective application only if the legislature intended to confer the same.[51] The principal rule of construction is that legislative intent must be interpreted from the words used by the legislature itself.[52]

The power of the courts to hold a provision as retrospective is limited to cases, wherein its implementation had led to consequences not intended by the legislature.[53] However, this is not reflected by the second proviso as the Parliament had expressly stated its intention of making the second proviso

[49] Keshavlal Jethalal Shah v. Mohanlal, (1968) AIR 1968 SC 1336; S.K. Govindan and Sons v. Commr. of Income-tax, Cochin, (2001) AIR 2001 SC 254; Birla Cement Works v. The Central Board of Direct Taxes, (2001) 9 SCC 35; Commissioner of Income-tax Bhopal v. Shelly Products, (2003) 5 SCC 461.
[50] Thomas George Muthoot v. CIT, (2016) 287 CTR (Ker) 101.
[51] CWT v. Varadharaja Theatre Pvt. Ltd., (2001) 250 ITR 523 (Mad.).
[52] Padmasundara Rao v. State of Tamil Nadu, (2002) 255 ITR 147.
[53] Administrator, Municipal Corpn., Bilaspur v. Dattatraya Dahankar, (1992) (1) SCC 361.

prospective with the object of relaxing the underlying intended hardships.[54] It is an accepted notion[55] that while construing fiscal statutes to determine tax liability one must resort to the strict letter of the law.[56] Additionally, a provision of exemption from tax, or a relaxation therein, in a fiscal statute is to be strictly construed.[57]

The language of the second proviso of Section 40(a)(ia) does not indicate that the same has been intended to be curative or remedial in nature. *Per contra,* the amendment has conferred an additional benefit on the assessees by allowing the non-deduction of TDS to not attract Section 40(a)(ia) in consonance with the second proviso; provisions that confer such additional benefits can only be prospective in nature.[58]

As held by the Hon'ble Madras High Court, the object of the Act must be interpreted in consonance to the language employed by the Parliament regarding the scheme of the same.[59] It has been laid down that the removal of hardship by the Parliament does not mechanically indicate a parliamentary intention to remove that hardship from an anterior date; the same may only be interpreted by the courts if the language of the amendment warrants the same.[60]

The underlying intent behind the enactment of Section 40 is to bolster the TDS regime that has been envisioned by the Parliament. The TDS regime

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[54] Housing Corporation and Anr. v. C.I.T, (2010) 326-ITR-642.
[55] Star Industries v. Commissioner of Customs, (2016) 2 SCC 362.
[56] A.V. Farnandez v. State of Kerala, (1957) CriLJ 1014.
[57] Oxford University Press v. CIT, (2001) 20 DTC 13.
[58] Prudential Logistics and Transports v. Income Tax Officer, Kozhikode [2014] (1) KHC 411.
[59] CWT v. Varadharaja Theatre Pvt. Ltd., (2001) 250 ITR 523 (Mad.).
[60] Union of India v. Raghubir Singh, (1989) 178 ITR 548 (SC).

serves the primary function of making the incomes of the public at large known to the authorities[61] and provides a steady flow of revenue to the Government. Moreover, Section 40(a)(ia) had achieved the objective of augmenting the TDS to a substantial extent.[62]

Therefore, the legislative intent behind Section 40(a)(ia) is to augment compliance with TDS provisions, which may be undermined if the amendment adding the second proviso of the Section is treated as retrospective in nature. If the second proviso is given retrospective effect, it may give an impression that TDS provisions are not strict and mandatory in nature- the same comes to being as the Judiciary undermines the tax policy formulated by the Government.[63]

2. The Second Proviso does not cure Unintended Consequences

The procedure laid down by Section 40(a)(ia) does not lead to a situation of double taxation provided that the letter of the law is followed; the Legal Information Institute defines double taxation as, "imposition of taxes on the same income, assets or financial transaction at two different points of time." Further, assuming but not admitting that the matter causes double taxation, the rule of avoidance of double taxation is merely a rule of construction.[64] Consequently, this rule of construction ceases to have application when the legislature expressly passes a statute that results in double taxation.[65] The rule of avoidance of double taxation essentially states

[61] Tube Investments of India Ltd. v. Asstt. CIT, (TDS) (2010) 325 ITR 610.
[62] *Id.*
[63] J.K. Synthetics Ltd. v. CTO, (1994) 119 CTR (SC) 222.
[64] Canadian Eagle Oil Co. v. R, (1945) 2 All ER 499; Laxmipat v. CIT, (1969) AIR 1969 SC 501; Jain Bros. v. Union of India, (1970) AIR 1970 SC 778.
[65] IRC v. F.S. Securities Ltd, (1964) 2 All ER 691 (HL).

that a legislation cannot be nullified on the sole basis that it results in double taxation.[66] The rule implies that the legislature has an inherent power to impose double taxation when it deems necessary, i.e., the Parliament, in theory, imposes double taxation as long as the same does not infringe on the Rights guaranteed under law.

Under the pre-amended Act if an assessee had deducted the TDS applicable – the contention of double taxation or unintended consequence would not arise. In such a scenario, the TDS paid by the assessee would have lessened the tax burden on the recipient of the same - resulting in no double taxation.

3. The Second Proviso does not seek to rectify any undue hardship

Every fresh levy of tax may be described as harsh from the perspective of taxpayers but beneficial from the point of view of the community. The legislature is empowered to impose a certain levy, even if it is presumed to be harsh, provided it falls within the overall framework of the Constitution of India. Given that the prospective application of an amendment is constitutional, the Court should avoid interpreting the same retrospectively.[67]

The courts are not empowered to give retrospective effect to a provision on the sole touchstone that the unamended provision caused hardship to the assessees.[68] The relevant consideration ought to be to ascertain whether the legislature intended to implement the original provision as is. That is, if the legislature took into account the harsh nature of the tax while

[66] Municipal Council, Kota v. Delhi Cloth & General Mills Co. Ltd., (2001) JT (3) SC 275.
[67] Bharathi Shipyard v. DCIT, (2011) 132 ITD 53 (Mumbai).
[68] De Vigier v. Inland Revenue Commissioners, (1964) 2 All ER 907 (HL).

promulgating the original provision then the Courts cannot grant retrospective application to future relaxations. Therefore, if the judiciary grants retrospective application to a provision that was expressly made prospective- the same would be in direct contravention to the doctrine of separation of powers.

The presumption against retrospective operation may be rebutted by necessary implication, where the amended Act is declaratory or curative in nature,[69] or where it is sought to cure an acknowledged evil for the benefit of the community as a whole.[70] *Per contra*, a declaratory provision is intended to remove any doubts from the language or interpretation of the existing law[71] or to rectify or clarify a gross mistake or omission in the former statute.[72] Hence, declaratory or explanatory statutes may be given retrospective operation.[73]

However, it is imperative to note that in absence of clear words indicating that the amending Act is declaratory in nature,[74] it cannot be so construed in the language, and the effect of the pre-amended provision were clear and unambiguous.[75]

The language of Section 40(a)(ia) was clear and unambiguous even before it was amended by Finance Act, 2012. It strictly disallowed deductions of those sums which warrant tax deduction at source and there was no

[69] CIT v. Vatika Township Pvt. Ltd., (2014) 367 ITR 466.; Zile Singh v. State of Haryana, (2004) 8 SCC 1.
[70] Singh, *supra* note 27.
[71] CIT v. Agriculture Market Committee, (2011) 337 ITR 299; CIT v. Vithal Textiles, (1989) 175 ITR 629.
[72] K. Govindan & Sons v. CIT, (2001) 247 ITR 192 (SC); CIT v. Podar Cement (P.) Ltd, 226 ITR 625 (SC); Keshavlal Jethalal Shah v. Mohanlal Bhagwandas, (1968) 3 SCR 623.
[73] CIT v. Vithal Textiles, (1989) 175 ITR 629.
[74] Union of India v. S. Muthyam Reddy, 1999 JT (7) SC 596.
[75] CIT v. Vithal Textiles, (1989) 175 ITR 629.

confusion in the language and operation of the same. Further, the amendment made by the Act does not seek to rectify any gross mistake or omission in the pre-amended statute.[76]

C. Test of Prior Implication

The Hon'ble Madras High Court has laid down the test to determine whether an amending Act is merely declaratory or is substantive in nature, thereby warranting prospective application.[77] It stated that the court must examine whether the pre-amended provision without the aid of the amendment is capable of taking within it what was subsequently included after the amendment.[78] This test has been followed in a plethora of judgments subsequently.[79]

Further, the Hon'ble Supreme Court has elucidated that the rule is that when a subsequent Act amends an earlier one in such a way as to incorporate itself, or a part of itself, into the earlier Act, then the earlier Act must thereafter be read and construed as if the altered words had been written into the earlier Act and the old words expunged - eliminating the need to refer to the amending Act.[80]

Presently, reading of the second proviso of Section 40(a)(ia) does not show that it was intended to be curative or remedial in nature. Instead, by this

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[76] Prudential Logistics and Transports v. Income Tax Officer, Kozhikode [2014] (1) KHC 411.
[77] CWT v. Varadharaja Theatre Pvt. Ltd., (2001) 250 ITR 523 (Mad.).
[78] *Id.*
[79] Dravida Munnetra Kazhagam v. CIT, (2002) 258 ITR 167 Mad; The Director of Income-Tax v. Paramartha Bhushanam, (2003) 182 CTR Mad 380, Commissioner of Wealth-tax v. T.N.K. Govindaraju Chetty & Co. Pvt. Ltd, (2004) 192 CTR (Mad) 382; Commissioner of Wealth-tax v. B.R. Theatres & Industrial Concerns (P.) Ltd, (2005) 272 ITR 177 (Mad).
[80] Shamrao v. District Magistrate Thana, (1957) AIR 1957 SC 23.

proviso, an additional benefit was conferred on the taxpayers. Since any reasonable interpretation of the pre-amended language of the Section cannot incorporate this consequence, the aforementioned test cannot be satisfied.[81]

V. DO BENEFICIAL PROVISIONS NECESSARILY WARRANT RETROSPECTIVE EFFECT?

Unless the language of the provision is ambiguous or confusing, they cannot be interpreted to confer a benefit to the assessee.[82] Hence, every case of removal of hardship by the legislature does not imply a parliamentary intention to remove the 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 warrant the same.[83]

Recently, in the case of *Shree Choudhary Transport Corporation*[84], the Hon'ble Apex Court interpreted the 30% restriction on disallowance under Section 40(a)(ia) introduced by the 2014 Amendment to be prospective in nature even though the same was beneficial to the assessee. The Court opined that the language of the Act is clear and unambiguous and does not warrant interference by the Court.[85] It further discussed the *Calcutta Export*[86]

[81] Prudential Logistics and Transports v. Income Tax Officer, Kozhikode [2014] (1) KHC 411.
[82] CIT v. Berger Paints (India) Ltd, (2002) 254 ITR 503 (Cal); IPCA Laboratory Ltd v. DCIT, (2004) (SC) 266 ITR 521; Shakti Tubes Ltd. v. State of Bihar, (2009) (3) AWC 2820 (SC); CIT v. N.C. Budharaja & Co, (1993) 204 ITR 412 (SC).
[83] CIT v. Pooshya Exports Pvt. Ltd, (2003) 262 ITR 417; Gem Granites v. CIT, (2005) 1 SCC 289.
[84] Shree Chaudhary Transport Company v. Income Tax Officer, [2020] 118 taxmann.com 47 (SC).
[85] *Id.*
[86] CIT v. Calcutta Export Co, (2018) 16 SCC 686.

judgement and distinguished the case, holding that the amendment in question was not curative or declaratory in nature.[87]

VI. EQUITY CONSIDERATIONS IN FISCAL STATUTES

Assuming but not admitting, that the notion of equity forms the sole touchstone upon which a provision is interpreted – the legislature has already put in place several equitable cut-offs[88] under which, the provision of TDS would not be applied to ensure that the Act does not cause harm to small businesses. The central government has given a blanket exemption of ₹ 30,000 for all assessees regarding fees received in lieu of technical services, professional services, royalties, or any sum that has been mentioned under Section 28 of the Act. In this regard, the legislature, in its infinite wisdom, has provided ample safeguards to small businesses against the rigor of TDS provisions.

Nonetheless, a plethora of decisions by various courts have categorically held[89] that equity considerations do not apply to tax statutes provided that the legislature was competent in promulgating the statute and that the same is not in violation of the rights guaranteed under the Constitution.

VII. CONCLUSION AND RECOMMENDATIONS

It is clear from the above discussion that the second proviso is not procedural, declaratory, or curative in nature and there exists no other reason why it should have been given retrospective operation by the Courts.[90] The

[87] *Supra* note 77.
[88] Income Tax Act, 1961, § 194J.
[89] Income Tax Act, 1961 § 194J (1)(B); Income Tax Act, 1961, § 194C (5).
[90] Commissioner of Income-tax v. S. K. Tekriwal, [2014] 361 ITR 432 (Calcutta); CIT v. Naresh Kumar, [2014] 262 CTR (Del.) 389.

prime consideration in most of the High Court judgements mentioned above was that the provision is beneficial in nature. However, as already discussed, and especially in light of the *Shree Choudhary*[91] judgement, a provision does not necessarily warrant retrospective operation merely because it is beneficial in nature. Therefore, all the reasons why the second proviso could have been given retrospective application by the Courts have been rebutted and the presumption in favour of prospective application stands untouched.

The lack of clarity regarding the second proviso of Section 40(a)(ia) has primarily stemmed from the different interpretations arrived at by the various High Courts – such discord shall be resolved by a Supreme Court decision in the aforementioned pending appeals[92] on the matter. However, the predictability of the statute is a cornerstone of tax law and one must ensure that the provisions of the Act are not susceptible to multiple interpretations. The suggestions of the present authors to remedy such vagueness are:

i. The statute must necessarily be interpreted in a strict manner; the courts ought to refrain from interpreting a statute merely on hardship to the assessees. If legislative competence is sound and the statute does not breach constitutional rights – the statute ought to be enforced in its express terms;

[91] Shree Chaudhary Transport Company v. Income Tax Officer, [2020] 118 taxmann.com 47 (SC).

[92] Commissioner of Income-tax-1 v. Ansal Landmark Township (P.) Ltd., (2016) 73 taxmann.com 63 (SC); Principal Commissioner of Income-tax-6 v. Noida Software Technology Park Ltd., (2020) 113 taxmann.com 145 (SC); Principal Commissioner of Income-tax-8, Delhi v. Shivaai Industries (P.) Ltd., (2020) 113 taxmann.com 166 (SC); Thomas Muthoot v. Commissioner of Income-tax, (2020) 120 taxmann.com 317 (SC).

ii. The intention of the legislature may be garnered from the memorandum accompanying the impugned provision however if the memorandum runs contradictory to the express terms of the statute the latter must be awarded a higher weightage;

iii. The second proviso of Section 40(a)(ia) should be interpreted as having prospective operation since the patent intent of the legislature substantiates such interpretation. Following the observations of the Hon'ble Apex Court in the *Shree Chaudhary* judgment, it is inferred that the second proviso is not curative or declaratory in nature since it does not seek to cure any ambiguity caused by the pre-amended language of the Act;

iv. Courts must not blindly interpret provisions as being beneficial to the assessee. Beneficial interpretation should only be resorted to in cases of patent ambiguity in the language of the statute which renders it impossible to understand the intention of the legislature. Similarly, the High Court decisions conferring retrospective application to the second proviso need to be revisited and reversed.