ORDER SHEET

IN THE HIGH COURT AT CALCUTTA

Special Jurisdiction(Income Tax)

ORIGINAL SIDE

ITAT 20 OF 2013
GA 190 OF 2013
COMMISSIONER OF INCOME TAX, KOLKATA-XI
Versus
CRESCENT EXPORT SYNDICATE

ITAT 30 OF 2013
GA 319 OF 2013
COMMISSIONER OF INCOME TAX, KOLKATA-XI
-VS-
PARK INTERNATIONAL

BEFORE:

The Hon'ble JUSTICE GIRISH CHANDRA GUPTA

The Hon'ble JUSTICE TARUN KUMAR DAS

Date : 3rd April, 2013.

APPEARANCE:

IN ITAT 20 OF 2013
GA 190 OF 2013
COMMISSIONER OF INCOME TAX, KOLKATA-XI
Versus
CRESCENT EXPORT SYNDICATE
Ms. S. Chatterjee, Adv.,.. for Appellant.
Mr. R.N. Dutta, Adv. with
Ms. S. Roy Chowdhury, Adv., ..for Respondent.

IN ITAT 30 OF 2013
GA 319 OF 2013
COMMISSIONER OF INCOME TAX, KOLKATA-XI
-VS-

PARK INTERNATIONAL
Mr. M. Nizamuddin, Adv., …For Appellant.
Mr. S. Bagchi, Adv.,
Mr. Khaitan, Sr. Adv……Amicus Curiae.

Dictated on 28th March 2013

The Court : The subject matter of challenge in ITAT No.30 of 2013 is a judgment and order dated July 18, 2012, by which the learned Tribunal, relying on the decision of a Special bench in the case of Merilyn Shipping & Transports (ITA 477/viz/2008, dated March 29, 2012) held as follows:

> "If all the amounts have been paid, then obviously following the principles laid down by the Hon'ble Special Bench of this Tribunal in the case of Merilyn Shipping & Transports, no addition shall be made. If any amount is found to be payable as on the year end, then the Assessing Officer shall give the assessee adequate opportunity to substantiate his case as to why the disallowance, if any, should not be made by invoking the provisions of section 40(1)(ia) of the Act".

ITAT No.20 of 2013 is directed against a judgment and order dated May 24, 2012, by which the learned Tribunal, following the aforesaid judgment in the case of Merilyn Shipping & Transports, passed the following order:

> "As the issue claimed by the assessee is that there is nothing payable as on 31.03.2006 and this expenditure of Rs.1,08,80,559/- is paid during the year and nothing remains payable, it means that the issue is covered. Principally, we have agreement with the assessee's counsel and are of the view that the issue is squarely covered in favour of the assessee. Principally, we allow this issue of the assessee but subject to the verification

by AO that these expenses are paid within the year i.e. up to 31.03.2006 and nothing remains payable. Hence, this appeal of assessee in principle is allowed in favour of the assessee but subject to verification."

The revenue has come up in appeal in both the matters.

Mr. Bagchi, learned Advocate appearing for the assessee in ITAT No.30 of 2013, drew our attention to the judgment in the case of Merilyn Shipping & Transports. The reasons why the Tribunal was of the opinion that clause (ia) of section 40 of the I.T. Act, 1961 did not apply to the amounts already paid, according to the aforesaid judgment of the Tribunal, are as follows:

"Now, I have to look at how this provision was proposed in the Finance Bill 2004 and compare it with what was finally enacted after the assent of the President. The comparative provision is as under:

Finance (N0.2) Bill, 2004 : (268 Finance Act 2004: Actual Enactment ITR(st.) 40-41)	
Amendment of section 40. – In such "40(a)(ia) 40 of the Income-tax Act, in clause (a), after sub-clause (i), the following shall be inserted with effect from the 1st day of April, 2005, namely:-	
(ia) any interest, commission or brokerage, fees for professional services of fees for technical services payable to a resident,or amount credited or paid 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 has not been deducted or, after deduction, has not been paid before the expiry of the time prescribed under sub-section (1) of section 200 and in accordance with the other provision of Chapter XVII-B:	(ia) any interest, commission or brokerage, rent, royalty, fees for professional services or fees for technical services payable to a contractor or or amounts payable to a contractor or sub-contractor, being resident, for carrying out any work (including supply of labour for carrying out any work), on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or, after deduction, has not been paid on or before the due date specified in sub-section (1) of section 139,-
Provided that where in respect of any Such sum, tax has been deducted under	**Provided** that where in respect of any such sum, tax has been deducted in any

Chapter XVII-B or paid in any Subsequent year, such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid."	subsequent year, or has been deducted during the previous year but paid after the due date specified in sub-section (1) of section 139, such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid."

"From the above comparison between the proposed and enacted provision, I find that the Legislature has replaced the word "amounts credited or paid" with the word 'payable" in the final enactment. As argued by ld. Counsel for assessee as well as for the Interveners, a question arises as to why the Legislature dropped the words "credited" and "paid" under section 40(a)(ia) as proposed in the Finance Bill, 2004."

"The provision of section 40(a)(ia) of the Act was introduced in order to ensure compliance of TDS but assigned the term "payable" in the provision of section 40(a)(ia) of the Act. On a comparison between the term "payable" in the provision the only conclusion, which can be reached, is that Legislature consistently replaced the words "amount credited" or "paid" with the word "payable" in the final enactment and such change was not done without any purpose. It is a basic presumption that an enactment was brought in by the Legislature is well-thought of and properly worded in order to give meaning to its intent by changing the words from "credited" or "paid" or to "payable". The legislative intent has been made clear that only the outstanding amount or the provision for expense liable for TDS is sought to be disallowed in the event there is a default of TDS."

"This proposition is also explained by Hon'ble Supreme Court in the case of CIT vs. Kelvinator of India Ltd. [2010] 320 ITR 561/187 Taxman 312 wherein it is held 'Our view gets support from the changes made to section 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words "reason to believe" but also inserted the word "opinion". However, on receipt of representations from the companies against omission of the words "reason to believe", Parliament reintroduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the AO.' And further Hon'ble Supreme Court quoted the relevant portion of circular No.549 dated October 31, 1989 [1990] 182 ITR (St.) 1, 29), which reads as under:"

> "7.2 Amendment made by the Amending Act, 1989, to reintroduce the expression 'reason to believe' in section 147.-A number of representations were received against the omission of the words 'reason to believe' from section 147 and their substitution by the 'opinion' of the Assessing Officer. It was pointed out that the meaning of the expression, 'reason to believe' had been explained in a number of court rulings in the past and was well settled and its omission from section 147 would give arbitrary powers to the Assessing Officer to reopen past assessments on mere change of opinion. To allay these fears, the Amending Act, 1989, has again amended section 147 to reintroduce the expression 'has reason to believe' in place of the words 'for reasons to be recorded by him in writing, is of the opinion'. Other provisions of the new section 147, however, remain the same."

"From the above, I am of the view that similar is the situation here that after receiving representations from professional bodies (copy of which is filed before us also), the Legislature in this provision replaced the word from "credited" or "paid" to "payable". I am of the view that where the language is clear, the intention of the Legislature is to be gathered from the language used. What is to be borne in mind is as to what has been said in the statute as also what has not been said. A construction which requires, for its support, addition or substitution of words or which results in rejection of words, has to be avoided, unless it is covered by the rule of exception, including that of necessity. In the present provision of Section 40(a)(ia) of the Act there is no such exception and the only word provided by Legislature is "payable".

" In the present case, the only word put in the provision of section 40(a)(ia) of the Act is "payable" and not "paid" or "credited", rather Legislature consciously replaced the words "amounts credited or paid" with the word "payable" in the final enactment and such change was done with a purpose. I am of the view that presumption that enactment brought in by the Legislature is well-thought off and properly worded in order to give meaning to its intent. The Legislature by consciously replacing the words from "credited" or "paid" or "payable", the intent has been made clear that only the outstanding amount or the provision for expenses are liable for TDS are to be disallowed in the event there is default in not following the TDS provisions under Chapter XVII-B of the Act. No doubt the object of section 40(a)(ia) of the Act is to ensure that the TDS

provision as provided in Chapter XVII-B is implemented without any default. As per section 40(a)(ia) of the Act any interest, commission or brokerage, rent, royalty, fees for professional services or fees for technical services "payable" on which tax is not deducted or the tax is deducted but the same is not paid within the time allowed such amount shall be disallowed while computing the income. The sub-section speaks of the amount "payable" on which the tax is not deducted and therefore it should apply only if any amount is "payable", but if the amount is already paid the provisions of this section should not apply. The crucial word is "payable". The question arises "whether payable means payable at the end of the year or payable at any time during the year though paid during the year itself? If one looks into the TDS Provisions from sections 194A to 194K, it will be apparent that as per the language of those sections, tax is to be deducted at the time the amount is paid or at the time when the amount is credited, i.e. when the liability is admitted and it becomes payable. Therefore wherever the payment is covered by aforesaid sections whether paid or credited, tax has to be deducted. Sections 194 L and 194 LA may also be looked into which says that tax has to be deducted only at the time of payment. The language in these sections therefore shows that the Legislature has used different language in different sections. It is trite law that each and every word of the section has its own meaning and while drafting section 40(a)(ia) was meant to be applicable only if the amounts covered therein was "payable" at the end of the year. Reference may be made, for the scope and effect of section 40(a)(ia) as clarified by CBDT in Circular No.5 of 2005, date 15th July, 2005 to show that the intention to introduce this provision was brought to curb bogus payments by creating bogus liability."

"In the present case, Section 40(a)(ia) of the Act creates a legal fiction for the amounts outstanding or remains payable i.e. at the end of every year as on 31st March and it cannot be extended for taxing the amounts already paid. In fact, Section 201 of the Act itself take care of tax to be collected in the hands of the payee and other TDS provisions under Chapter XVIIB of the Act. No further legal fiction from elsewhere in the statute can be borrowed to extend the field of Section 40(a)(ia) of the Act. This fiction cannot be extended any further and, therefore, cannot be invoked by Assessing Officer to disallow the genuine and reasonable expenditure on the amounts of expenditure already paid."

"On comparison between the proposed and enacted provision, the only conclusion which I can reach is that the Legislature consciously replaced the words "amounts credited or paid" with the word "payable" in the final enactment. By changing the words from "credited" or "paid" to "payable", the legislative intent has been made clear that only outstanding amounts or the provisions for expenses liable for TDS under Chapter XVII-B of the Act is sought to be disallowed in the event there is a default in following the obligations casted upon the assessee under Chapter XVII-B of the Act."

Mr. Bagchi drew our attention to the relevant clause (ia) which reads as follows:

> "*(ia)* 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 :]
>
> [**Provided** that where in respect of any such sum, tax has been deducted in any subsequent year, or has been deducted during the previous year but paid after the due date specified in sub-section (1) of section 139, such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid.]"

Mr. Bagchji contended that there may be two possible constructions. However the construction that the word 'payable' is interchangeable with word 'paid' shall make the position of the assessee who has already paid, without deducting tax, worse than the assessee who has not as yet paid. If on the other hand the word 'payable' is not so

construed the scope of any such mischief shall be altogether eliminated. In the case of the assessees who already have paid the disallowance of the expenditure shall be permanent. They shall have no means of deducting tax relatable to the amount already paid in the subsequent year and thus the relief contemplated by the proviso can never be availed by them.

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."*

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.

We requested Mr. Khaitan, learned Senior Advocate to assist the Court in resolving the issue. The matter was directed to be listed for further hearing on 1st April, 2013.

Dictated on 3rd April 2013

Mr. Khaitan, learned Senior Counsel, submitted that the views expressed by the Accountant Member are preferable to the views expressed by the Judicial

Members. The Accountant Member in the case of Merilyn Shipping & Transports

had expressed the following views :

"12.2. The question for consideration is as to why the words 'credited' or 'paid' contemplated in the Bill were dropped while incorporating Section 40(a)(ia). All the amounts whether 'credited' or 'paid' come within the ambit of term 'payable' and, therefore, the two terms, viz. 'credited' or 'paid' were only superfluous and, therefore, were dropped in the Section 40(a)(ia) inserted in the Act. In the provisions relating to TDS, the relevance of these terms was with reference to timing of deduction but while making disallowance under Section 40(a)(ia), these terms had no relevance and, therefore, legislature dropped these two terms, viz. 'paid' or 'credited' before insertion of Section 40(a)(ia) in the statute.

12.3. It is noticeable that Section 40(a) is applicable irrespective of the method of accounting followed by an assessee. Therefore, by using the term 'payable' legislature included the entire accrued liability. If assessee was following mercantile system of accounting, then the moment amount was credited to the account of payee on accrual of liability, TDS was required to be made but if assessee was following cash system of accounting, then on making payment TDS was to be made as the liability was discharged by making payment. The TDS provisions are applicable both in the situation of actual payment as well of the credit of the amount. It becomes very clear from the fact that the phrase, 'on which tax is deductible at source under Chapter XVII-B', was not there in the Bill but incorporated in the Act. This was not without any purpose.

12.4 In our considered opinion, there is no ambiguity in the Section and term 'payable' cannot be ascribed narrow interpretation as contended by assessee. Had the intentions of the legislature were to disallow only items outstanding as on 31st March, then the term 'payable' would have been qualified by the phrase as outstanding on 31st March. However, no such qualification is there in the section and, therefore, the same cannot be read into the section as contended by the assessee.

13. Section 40(a)(ia) is to be interpreted harmoniously with the TDS provision as its operation solely depends on the provisions contained under Chapter XVII-B. It contemplates one of the consequences of non-deduction of tax and ,therefore, has to be interpreted in the light of mandatory provisions contained under Chapter XVII-B. It would be appropriate to reproduce Section 40(a)(ia), which reads as under:-

Section 40(a)(ia):- 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,-

(A) in a case where the tax was deductible and was so deducted during the last month of the previous year, on or before the due date specified in sub-section (1) of Section 139; or
(B) in any other case, on or before the last day of the previous year:]

[**Provided** that where in respect of any such sum, tax has been deducted in any subsequent year, or has been deducted -

(A) during the last month of the previous year but paid after the said due date; or
(B) during any other month of the previous year but paid after the end of the said previous year,

such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid.]

Explanation:-For the purposes of this sub-clause,-

(i) "commission or brokerage" shall have the same meaning as in clause (i) of the Explanation to section 194 H;
(ii) "fees for technical services" shall have the same meaning as in Explanation 2 to clause (vii) of sub-section (I) of section 9;
(iii) "professional services" shall have the same meaning as in clause (a) of the Explanation to section 194J;
(iv) "work" shall have the same meaning as in Explanation III to section 194C;
[(v) "rent" shall have the same meaning as in clause (I) to the Explanation to section 194-I;
(v) "royalty" shall have the same meaning as in Explanation 2 to clause (vi) of sub- section (I) of section 9;]

Section 40 contained in Chapter IV deals with computation of business income and lists out various amounts which are not deductible notwithstanding anything to the contrary in Sections 30 to 38. This implies that even if a particular amount is allowable under Sections 30 to 38 still, if it does not comply the provisions contained in Section 40, then the same cannot be allowed.

The basic ingredients of Section 40(a)(ia) are as under:-

(i) It applies to interest, commission or brokerage, rent, royalty, fees for professional services or fees for technical services;

(ii) The aforementioned amounts are payable to a resident,

(iii) The amounts are payable to a contractor or sub-contractor being resident.

(iv) Tax is deductible at source under Chapter XVII-B in respect of amounts payable in respect of a aforementioned items.

(v) Tax has not been deducted as per requirement of Chapter XVII-B.

(vi) After deduction of tax, amount has not been paid.

Therefore, if aforementioned conditions are not fulfilled then deduction would not be allowed.

However, proviso to this Section further gives leverage to assessee to deduct tax in subsequent year or pay tax deducted during the previous year after the due date specified in Section 139(1). In such a situation, deduction would be allowed in the year in which such tax has been deducted. The explanation to this Section defines various amounts contemplated in this Section. The relevant Sections in Chapter XVII-B are re-produced hereunder:-

Interest on securities.
193. The person responsible for paying [to a resident] any income [by way of interest on securities] shall, [at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier], deduct income-tax [***] at the rates in force on the amount of the interest payable:

Payments to contractors and sub-contractors.
194C. (1) Any person responsible for paying any sum to any resident (hereinafter in this section referred to as the contractor) for carrying out any work (including supply of labour for carrying out any work) in pursuance of a contract between the contractor and –
** ** **
shall, at the time of credit of such sum to the account of the contractor or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct an amount equal to-

(i) one per cent in case of advertising,
(ii) in any other case two per cent,

of such as income-tax on income comprised therein.

Commission or brokerage:

194-H: Any person, not being an individual or a Hindu undivided family, who is responsible for paying, on or after the 1st day of June, 2001, to a resident, any income by way of commission (not being insurance commission referred to in Section 194D) or brokerage, shall, at the time of credit of such income to the

account of the payee or at the time of payment of such income in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rate of (ten) per cent:
** ** **

Rent.

194-I. Any person not being an individual or a Hindu undivided family, who is responsible for paying to a resident any income by way of rent, shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rate of -

(a) ten per cent for the use of any machinery or plant or equipment;

(b) fifteen per cent for the use of any land or building (including factory building) or land appurtenant to a building (including factory building) or furniture or fittings where the payee is an individual or a Hindu undivided family; and

(c) twenty per cent for the use of any land or building (including factory building) or land appurtenant to a building (including factory building) or furniture or fittings where the payee is a person other than an individual or a Hindu undivided family:

Fees for professional or technical services
Section 194-J:-

(1) Any person, not being an individual or a Hindu undivided family, who is responsible for paying to a resident any sum by way of -

(a) fees for professional services, or
(b) fees for technical services,
(c) royalty, or
(d) any sum referred to in Clause (va) of Section 28,

shall, at the time of credit of such sum to the account of the payee or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct an amount equal to ten per cent of such sum as income tax on income comprised therein:

** ** **
Explanation. – For the purposes of this section,-

(a) “professional services” means services rendered by a person in the course of carrying on legal, medical, engineering or architectural profession or the profession of accountancy or technical consultancy or

interior decoration or advertising or such other profession as is notified by the Board for the purposes of section 44AA or of this section;

(b) "fees for technical services" shall have the same meaning as in Explanation 2 to clause (vii) of sub-section (I) of section9;

(ba) "royalty" shall have the same meaning as in Explanation 2 to clause (vi) of sub-section (1) of section 9;

(c) where any sum referred to in sub-section (1) is credited to any account, whether called "suspense account" or by any other name, in the books of account of the person liable to pay such sum, such crediting shall be deemed to be credit of such sum to the account of the payee and the provisions of this section shall apply accordingly.

If we examine the aforementioned sections, we find that identical considerations permeate through all the aforementioned Sections which are as under:-

(i) any person responsible for paying any sum to any resident in respect of aforementioned items;

(ii) shall;

(iii) at the time of credit of such sum to the account of the payee or at the time of payment thereof in cash or by issue of cheque or draft or by any other mode, whichever is earlier;

(iv) Deduct income tax thereon at the prescribed rate;

The term 'shall' used in all these sections make it clear that these are mandatory provisions and applicable to the entire sum contemplated under the respective sections. These sections do not give any leverage to the assessee to make the payment without making TDS. On the contrary, the intention of the legislature is evident from the fact that timing of deduction of tax is earliest possible opportunity to recover tax, either at the time of credit in the account of payee or at the time of payment to payee, whichever is earlier.

When we examine Section 40(a)(ia) in the backdrop of these sections, we find that it refers to the amount 'payable' 'on which tax was deductible at source under Chapter XVII-B'. Applying the principles of eujesdem generis, it can easily be inferred that term 'payable' in section 40(a)(ia) has to be interpreted in the light of sum referred to in various sections contained in Chapter XVII-B noted above, on which tax was deductible and, therefore, the term 'payable' in Section 40(a)(ia) refers to entire amount on which tax was required to be deducted. Keeping in view the principles of harmonious construction, the term 'payable' in Section 40(a)(ia) cannot be read separately from the provisions relating to TDS as pleaded on behalf of assessee. In our opinion, ld. CIT (Appeals) has rightly observed that

taking the spirit of TDS provision into account and Section 40(a)(ia) being directly related to such TDS provision, a harmonious construction of the word 'payable' leads to inevitable conclusion that the said word also includes the 'paid' amount.

14. Ld. Counsel has relied on the dictionary meaning of term 'payable' which, in our opinion, cannot be resorted to in view of discussion in foregoing paras. The context in which term 'payable' has been used in Section 40(a)(ia) is to be taken into consideration. The context is various sections of Chapter XVII-B.

15. The next argument of ld. Counsel is based on the definition of term 'paid' as contemplated under Section 43(2) which reads as under:-

"43(2) : 'paid' means actually paid or incurred according to the method of accounting upon the basis of which the profits or gains are computed under the head 'profits and gains of business or profession' ".

16. A bare reading of the above provision would make it clear that the term 'paid' does not only mean actual payment but if the liability has been incurred according to the method of accounting followed by the assessee, then the same also comes within the purview of term 'paid'. If the assessee is following mercantile system of accounting then as soon as the liability accrues in its favour, the same is accounted for by crediting the amount of payee. Thus, it is evident that the emphasis is on liability to pay and not on actual payment. If we accept the contention of assessee, then Section 40(a)(ia) would become otiose and the section will not be attracted where payment is made though without deducting tax at source. Ld. Counsel has referred to the various decisions and in the case of Jaipur Vidyut Vitaran Nigam Limited (supra), the Tribunal had relied on the definition of Section 43(2) but the import of phrase 'incurred in accordance with the method of accounting followed' was not considered. Therefore, the finding that by implication the word 'payable' does not include 'paid' cannot be accepted.

17. The next argument of ld. Counsel for the assessee is based on Rule 30, which contemplates time and mode of payment to Government account of tax deducted at source. In our opinion, this Rule merely contemplates the procedure of depositing the TDS amount and merely because different time limits are prescribed, it would not follow that different considerations would apply while considering the term 'payable' under Section 40(a)(ia) of the Act. Ld. Counsel has also referred to Section 234B dealing with levy of interest to demonstrate that actual payment and payable amount are to be separately dealt with. However, these procedural sections cannot override the substantive provision of the Act.

Tribunal in the case of Jaipur Vidyut Vitaran Nigam Limited (supra) has also observed that Section 40(a)(ia) being a legal fiction needs to be construed strictly. There is no quarrel with this proposition but at the same time we have to take

into consideration the context in which a particular word is used and the overall purpose sought to be achieved by inserting a Section in the Act.

18. One more argument of assessee is that if the amount has already paid, then the assessee will not be able to in a position to deduct any pay tax, because, under such circumstances, as per the provisions of Section 191, the liability for payment of tax is to be discharged by payee. In the first place, the argument seems to be quite convincing because the assessee would be deprived of genuine expenditure and the payee will pay the tax on its income. Further, the proviso to Section 40 (a)(ia) does not make any provision in regard to this contingency. This may be a case of casus omisus but the Court cannot fill this gap. Hon'ble Allahabad High Court in the case of Dey's Medicals (UP) (P) Ltd.' case (supra) observed as under:-

"Once a deduction of a particular amount is not allowable under the Act, it is liable to be taxed and merely because some other person may also be liable to tax after receiving the said amount in one or the other manner, it cannot be said that former assessee is entitled for exemption and cannot be taxed. No authority is shown providing that such taxation is not permissible in law and is bad even otherwise."

19. Ld. ClT, DR has strongly relied on the decision of the Hon'ble Madras High Court in the case of Tube Investments of India Ltd.'s case (supra). The contention of Ld. Counsel for the assessee is that this decision was rendered in the context of constitutional validity of the provisions of section 40(a)(ia) and, therefore, in view of the decision of Hon'ble Delhi High Court in the case of Lachman Dass Bhatia Hingwala (P) Ltd.'s case (supra), the said decision is not relevant. It is true that this decision has been rendered in the context of examining of constitutional validity of the provisions of section 40(a)(ia) of the Act but in course of examining the constitutional validity, Hon'ble Madras High Court has extensively considered the import of section 40(a)(ia) and, therefore, in our opinion, this decision has strong bearing on the present issue.

20. Hon'ble Madras High Court has noticed various contentions of assessee. We re-produce some contentions, which have direct bearing on the present issue:-

> "At para 5 of judgment: Mr. C. Natarajan, learned senior counsel appearing for the petitioners in Writ Petn. Nos. 10750 and 10751 of 2009 contended that while contractors business has no nexus to the determination of profits and gains of the business of the petitioner, s. 40(a)(ia) mutates itself to tax the petitioners at a disproportionate rate and quantum while purporting to address s. 194C and the contractors. According to him the effect of s. 40(a)(ia) is so grossly unreasonable that it imposes tax liability on the business of the petitioners even if the contractor himself paid the tax in his returns in the absence of TDS effected by the petitioners.
>
> At para 14 of judgment: According to the learned senior counsel, the implication of s. 40(a)(ia) is irrespective of the circumstances in which the deduction failed to be made and therefore it is arbitrary. By relying upon the decisions of the Hon'ble Supreme Court in the case of Coca cola and Eli Lily,

the learned senior counsel contended that when the Hon'ble Supreme court has held that the liability of an assessee under s. 201 on failure to deduct or pay tax disappears once the recipient has paid the fix and even penalty cannot be levied if there was a reasonable cause for non-deduction, it should be held that s. 40(a)(ia) cannot be invoked in the case were the recipient had paid the tax. Absence of such a relief under s. 40(a)(ia) makes the provision arbitrary.

At para 18 of judgment: According to the learned counsel when the object of introduction of s. 40(a)(ia) is to enforce TDS provision, in the light of the fact that very many provisions by way of imposition of penalty, interest and prsecution have been providved under the recovery chapter viz. Chapter XVII, the addition of s. 40(a)(ia) disallowing the whole of the actual expenditure is highly onerous and thereby it becomes arbitrary, unreasonable warranting declaration of the provision as ultra vires of the Constitution.

At para 20 of judgment: According to the learned Counsel, the proviso to s. 40(a)(ia) does not in any way mitigate the damage caused under the main provision. It was also contended that under s. 195(5) of the Act relating to non-residents, where on production of a certificate as per the IT Rules, the requirement of TDS is exempted, such a safety valve measure not being available in respect of a resident recipient, s. 40(a)(ia) is unreasonable and unjustifiable.

At para 24 of judgment: According to the learned counsel a comparative reading of s.40(a)(ia) and s. 198 would show that while under s. 198, the non-deduction of TDS would result in deemed income in the hands of the assessee, there is no such expression in s. 40(a)(ia) and consequently the non-income viz., the expenditure cannot be treated as deemed income in the hands of the assessee. The learned counsel also contended that since the recipient of the expenditure of the assessee is also taxed, the imposition of tax by invoking s. 40(a)(ia) would result in double taxation which cannot be permitted.

At para 25 of judgment: The learned counsel by pointing out ss. 205 and 64 of the Act contended that in similar situations the legislature has made specific exoneration of double taxation. The learned counsel relied upon:

(i) CIT v. Indo Nippon Chemicals co. Ltd. [2003] 182 CTR 291/

[2003] 261 ITR 275 (SC);

(ii) K.P. Varghese v. CIT [1981] 24 CTR 358 [1981] 131 ITR 597

(SC);

(iii) Navnit Lai C. Javeri v. K.K.Sen, AAC [1065] 56 ITR 198 (SC);

(iv) Govind Saran Ganga Saran v. CST [1985] 155 ITR 144 (SC);

(v) Godhira Electricity Co. Ltd. v. CIT [1997] 139 (JR 564/ [1997] 225 ITR 746 (SC) in support of his submissions.

At para 33 of judgment: It was then contended that an expenditure is not an income and consequently the collection of tax as envisaged under Art. 265 is not permissible. It was also contended that s. 40(a)(ia) conflicts with S. 145 of the Act since the method of accounting is disturbed.

At para 41 of judgment: As against the submissions of the petitioners that the provision is illusory, the learned counsel contended that though the words used in the proviso are deduct and pay, there is no prohibition for the assessee to make the payment without any deduction. In that context, the learned counsel relied upon s. 195A and stated that such a situation is envisaged therein. The learned standing counsel also relied upon Addl CIT v. Farasol Ltd. [1987] 163 ITR 364 (Raj.) where in the context of s.40(a) it was held by the Rajasthan High Court that even where the amount is paid out of the assessee's pocket but not deducted, he would be eligible for the deduction.

At para 46 of judgment : Mr.K. Subramaniam, learned standing counsel for the IT Department brought to our notice the CBDT circulars published in [2009] 310 ITR (St)55, wherein it was stated that the introduction of s.40(a)(ia) allows additional time (till due date of filing return of income) for deposit of TDS pursuant to the deduction made for the month of March so that the disallowance under the sub-clause is not attracted. The learned standing counsel submitted a statement containing the TDS collections for the financial year 2008-09, which was Rs.1,30,470.8 crores as compared to other forms of tax collections which shows that out of the net collection, at least 1/3 is by way of TDS. The learned standing counsel therefore contended that the object for introducing s.40(a)(ia) has really worked viz., augmentation of the TDS provision and therefore the provision should be upheld.

In the backdrop of these submissions, Hon'ble Madras High Court upheld the constitutional validity of the provisions of section 40(a)(ia) and made various observations:-

(i) Hon'ble Madras High Court, inter alia, noted the observations of Hon'ble Supreme Court in the case of A.S.Krishna v. State of Madras AIR 1957 SC 297 which are as under:-

'It would be quite an erroneous approach to the question to view such a statute not as an organic whole, but as a mere collection of sections then disintegrate it into parts, examine under what heads of legislation those parts would severally fall, and by that process determine what portions thereof are inter vires and what are not. Thus, section 40(a)(ia) could not be viewed independently and had to be considered along with other provisions.

(ii) The provisions of section 40(a)(ia) were compared with the provisions of section 201 of the Income Tax Act and, it was, inter alia, observed that as far as section 201 is concerned that would relate to the amount of tax that could be deducted by way of TDS. However, as far as section 40(a)(ia) is concerned, which would result in the disallowance of whole of the expenditure and thereby the entire sum expended would attract the levy of tax at a prescribed rate with all other conditions such as surcharge, etc.

Thus, Hon'ble Madras High Court has also held in para 61 of its judgment that "whole of the expenditure claimed without

making TDS is to be disallowed and not only part of the expenditure".

(iii) The Finance Bill No.2 of 2004 states that the insertion of clause (ia) in clause (a) to section 40 of the Act was with a view to augment compliance of TDS provisions.

(iv) When the provisions and procedures relating to TDS are scrupulously applied, first and foremost it ensures the identification of the payees and thereby network of assessees gets confirmed. When once such identity of assessees, who are in receipt of the income can be ascertained, it will enable tax collection machinery to bring within its fold all such persons who are liable to come within the network of taxpayers.

Thus, if it is held that the provisions of section 40(a)(ia) are not applicable in respect of those payments which have been paid without making TDS and at the end of the year no amount is outstanding then the very object of identification of payees will get frustrated.

(v) The legislative intent of the introduction of section 40(a)(ia) is in the larger perspective of augmenting the very TDS provisions themselves. It is not merely related to the collection of TDS only.

(vi) The intention of the legislature is not to tax the payer for its failure to deduct the tax at source. The object of introduction of section 40(a)(i) as well as section 40(a)(ia) is to ensure that one of the modes of recovery as provided in Chapter XVII-B is scrupulously implemented without any default, in order to augment the said mode of recovery.

Hon'ble Madras High Court, *inter alia,* observed at para 69 of its judgment as under:-

"With the proviso to section 40(a)(ia) the deduction in the subsequent year by rectifying the default committed in the matter of TDS in the previous year, a defaulting assessee cannot be heard to say that irrespective of the deliberate default committed by it in implementing the provision relating to TDS, it should be held that a higher tax liability is mulcted on it".

Hon'ble Madras High Court, *inter alia,* observed in para 83 of its judgment as under:-

"After all the proviso has been inserted in order to ensure that even a defaulter is not put to serious prejudice, in as much as, by operation of the substantive provision, the expenditure which is otherwise allowable as a deduction is denied on the ground that the obligation of TDS provisions is violated. The law makes while imposing such a stringent restriction wanted to simultaneously provide scope for the defaulter to gain the deduction by complying with the TDS provision at a later pint of time".

Thus, impliedly Hon'ble Madras High Court, has, *inter alia,* held that the provisions of section 40(a)(ia) will be applicable with respect to entire expenditure. It is true that specific issue regarding 'paid', 'credited' and 'payable' has not been considered but from the judgment it is evident that if assessee's contention is accepted then the very object of incorporation of section 40(a)(ia) would be frustrated.

21. In view of above discussion, we answer the question as under:-

The provisions of section 40(a)(ia) of the Income Tax Act, 1961, are applicable not only to the amount which is shown as payable on the date

of balance-sheet, but it is applicable to such expenditure, which become payable at any time during the relevant previous year and was actually paid within the previous year. In the result the question is decided in favour of revenue and against the assessee.**"**

Before dealing with the submissions of the learned Counsel appearing for the assessees in both the appeals we have to examine the correctness of the majority views in the case of Merilyn Shipping.

We already have quoted extensively both the majority and the minority views expressed in the aforesaid case. The main thrust of the majority view is based on the fact "that the Legislature has replaced the expression "amounts credited or paid" with the expression 'payable' in the final enactment.

Comparison between the pre-amendment and post amendment law is permissible for the purpose of ascertaining the mischief sought to be remedied or the object sought to be achieved by an amendment. This is precisely what was done by the Apex Court in the case of CIT Vs. Kelvinator reported in 2010(2) SCC 723. But the same comparison between the draft and the enacted law is not permissible. Nor can the draft or the bill be used for the purpose of regulating the meaning and purport of the enacted law. It is the finally enacted law which is the will of the legislature.

The Learned Tribunal fell into an error in not realizing this aspect of the matter.

The Learned Tribunal held "that where language is clear the intention of the legislature is to be gathered from the language used". Having held so, it was not open to seek to interpret the section on the basis of any comparison between the draft and the section actually enacted nor was it open to speculate as to the effect of the so-called representations made by the professional bodies.

The Learned Tribunal held that "Section 40(a)(ia) of the Act creates a legal fiction by virtue of which even the genuine and admissible expenses claimed by an assessee under the head "income from business and profession" if the assessee does not deduct TDS on such expenses are disallowed".

Having held so was it open to the Tribunal to seek to justify that "this fiction cannot be extended any further and, therefore, cannot be invoked by Assessing Officer to disallow the genuine and reasonable expenditure on the amounts of expenditure already paid"? Does this not amount to deliberately reading something in the law which is not there?

We, as such, have no doubt in our mind that the Learned Tribunal realized the meaning and purport of Section 40(a)(ia) correctly when it held that in case of omission to deduct tax even the genuine and admissible expenses are to be disallowed. But they sought to remove the rigour of the law by holding that the disallowance shall be restricted to the money which is yet to be paid. What the Tribunal by majority did was to supply the casus omissus which was not permissible and could only have been done by the Supreme Court in an appropriate case. Reference in this regard may be made to the judgment in the case of Bhuwalka Steel Industries vs. Bombay Iron & Steel Labour Board reported in 2010 (2) SCC 273.

'Unprotected worker' was finally defined in Section 2 (II) of the Mathadi Act as follows:-

" 'unprotected worker' means a manual worker who is engaged or to be engaged in any scheduled employment."

The contention raised with reference to what was there in the bill was rejected by the Supreme Court by holding as follows:-

"It must, at this juncture, be noted that in spite of Section 2(11), which included the words "but for the provisions of this Act is not adequately protected by legislation for welfare and benefits of the labour force in the State", these precise words were removed by the legislature and the definition was made limited as it has been finally legislated upon. It is to be noted that when the Bill came to be passed and received the assent of the Vice- President on 05-06-1969 and was first published in the Maharashtra Government Gazette Extraordinary, Part IV on 13-06-1969, the aforementioned words were omitted. Therefore, this would be a clear pointer to the legislative intent that the legislature being conscious of the fact and being armed with all the Committee reports and also being armed with the factual data, deliberately avoided those words. What the appellants are asking was to read in that definition, these precise words, which were consciously and deliberately omitted from the definition. That would amount to supplying the casus omissus and we do not think that it is possible, particularly, in this case. The law of supplying the casus omissus

by the courts is extremely clear and settled that though this Court may supply the casus omissus, it would be in the rarest of the rare case and thus supplying of this casus omissus would be extremely necessary due to the inadvertent omission on the part of the legislature. But, that is certainly not the case here".

We shall now endeavour to show that no other interpretation is possible.

The key words used in Section 40(a)(ia), according to us, are "on which tax is deductible at source under Chapter XVII –B". If the question is "which expenses are sought to be disallowed?" The answer is bound to be "those expenses on which tax is deductible at source under Chapter XVII –B. Once this is realized nothing turns on the basis of the fact that the legislature used the word 'payable' and not 'paid or credited'. Unless any amount is payable, it can neither be paid nor credited. If an amount has neither been paid nor credited, there can be no occasion for claiming any deduction.

The language used in the draft was unclear and susceptible to giving more than one meaning. By looking at the draft it could be said that the legislature wanted to treat the payments made or credited in favour of a contractor or sub-contractor differently than the payments on account of interest, commission or brokerage, fees for professional services or fees for technical services because the words "amounts credited or paid" were

used only in relation to a contractor or sub-contractor. This differential treatment was not intended. Therefore, the legislature provided that the amounts, on which tax is deductible at source under Chapter XVII-B payable on account of interest, commission or brokerage, rent, royalty, fees for professional services or fees for technical services or to a contractor or sub-contractor shall not be deducted in computing the income of an assessee in case he has not deduced, or after deduction has not paid within the specified time. The language used by the legislature in the finally enacted law is clear and unambiguous whereas the language used in the bill was ambiguous.

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.

For the reasons discussed above, we are of the opinion that the majority views expressed in the case of Merilyn Shipping & Transports are not acceptable. The submissions advanced by learned advocates have already been dealt with and rejected.

The appeal is, thus, allowed in favour of the revenue.

Urgent xerox certified copy of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

(GIRISH CHANDRA GUPTA, J.)

(TARUN KUMAR DAS, J.)

dg2/snn