IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "A", PUNE

BEFORE SHRI G.S. PANNU, ACCOUNTANT MEMBER
AND MS. SUSHMA CHOWLA, JUDICIAL MEMBER

ITA No.1372/PN/2013
(Assessment Year : 2010-11)

Asstt. Commissioner of Income Tax,
Circle-2, Aurangabad. .... Appellant

Vs.

Shri Bhavook Chandraprakash Tripathi,
(Prop. Sanshu Industries), K-221,
MIDC, Waluj, Aurangabad.
PAN : ABBPT7159D .... Respondent

Department by	:	Smt. Shailja Rai
Assessee by	:	Shri Sunil Ganoo
Date of hearing	:	04-03-2015
Date of pronouncement	:	18-03-2015

ORDER

PER G. S. PANNU, AM

The captioned appeal by the Revenue is directed against an order of the Commissioner of Income Tax (Appeals), Aurangabad dated 02.04.2013 which, in turn, has arisen from an order dated 04.03.2013 passed by the Assessing Officer u/s 143(3) of the Income-tax Act, 1961 (in short "the Act") pertaining to the assessment year 2010-11.

2. By way of the present appeal, Revenue has raised the following Grounds of Appeal :-

> *"1) On the facts and circumstances of the case, whether the Learned Commissioner of Income Tax (Appeals), Aurangabad was justified in deleting the addition of Rs.16,82,727/- u/s 40(a)(ia).*
>
> *2) On the facts and in the circumstances of the case, the order of the Assessing Officer be restored and that of the Commissioner of Income Tax (Appeals), Aurangabad be vacated."*

3. The only issue in this appeal arises from a disallowance of Rs.16,82,727/- made by the Assessing Officer by invoking section 40(a)(ia) of the Act. The aforesaid amount comprised of interest paid of Rs.16,42,152/- to

Bajaj Auto Finance Ltd. and legal charges paid to Rs.40,120,/-. Although, the aforesaid expenditures were debited in the Profit & Loss Account on account of failure of the assessee to deduct the relevant tax at source, the Assessing Officer invoked section 40(a)(ia) of the Act and disallowed the same. The CIT(A) has set-aside the disallowance on the ground that the provisions of section 40(a)(ia) of the Act are not applicable in the present context since the aforesaid amounts were not payable at the end of the year but were already paid to the respective parties. While doing so, the CIT(A) has primarily relied upon the decision of the Special Bench of the Tribunal in the case of M/s Merilyn Shipping & Transports, Visakhapatnam vs. Addl. CIT, (2012) 70 DTR 81 (SB). On this aspect, it was a common point between the parties that similar issue had come up before our Co-ordinate Bench in the case of Vinay Ashwinikumar Joneja Vs. ITO vide ITA No.1514/PN/2012, wherein it has been held that provisions of section 40(a)(ia) of the Act are applicable also to the amounts which are actually paid and are not outstanding as on the year end. The following discussion in the order of the Tribunal dated 22.10.2013 is relevant in this context :-

> *"8. We have considered the rival arguments made by both the sides, perused the orders of the Assessing Officer and the CIT(A) and the Paper Book filed on behalf of the assessee. We have also considered the various decisions cited before us. There is no dispute to the fact that the Assessing Officer in the body of the assessment order disallowed an amount of Rs.7,20,252/- u/s.40(a)(ia) for non deduction of tax. We find the Ld.CIT(A) distinguishing various decisions cited before him upheld the disallowance made by the Assessing Officer. It is the case of the Ld. Counsel for the assessee that in view of the decision of Hon'ble Allahabad High Court in the case of M/s. Vector Shipping Service Pvt. Ltd. (Supra) no disallowance u/s.40(a)(ia) can be made since no amount was payable at the end of the year.*
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> *8.1 We find the Hon'ble High Court while deciding the issue has relied on the decision of the Special Bench of the Tribunal in the case of Merilyn Shipping and Transport Ltd. reported in 136 ITD 23 (SC). We find the decision of the Special Bench of the Tribunal in the case of Merilyn Shipping and Transport Ltd. (Supra) was reversed by the Hon'ble Calcutta High Court in the case of CIT Vs. Crescent Export Syndicate vide order dated 03-04-2013 reported in TIOL-404-HC-KOL. The relevant observation of the Hon'ble High Court read as under :*
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> *"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.*
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> ***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:-*
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> *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 section194C;
[(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 forprofessional 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 (l) 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. CIT, 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 prosecution have been provided 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."

8.2 We find the Hon'ble Gujarat High Court in the case of CIT Vs. Sikandarkhan N. Tunvar in the order dated 02-05-2013 reported in 2013-TIOL-389-HC-AHM has held as under :

"5. In all these appeals the Tribunal has followed the decision of the Special Bench in the case of M/s. Merilyn Shipping & Transports vs. ACIT (supra) and deleted the disallowance on this limited ground. As in the present case, other grounds of controversy between the parties with respect to allowability or otherwise of such expenditure was not examined by the Tribunal. For the purpose of these appeals, therefore, we frame following substantial questions of law:-

"1. Whether disallowance under Section 40(a)(ia) of the Income Tax Act, 1961 could be made only in respect of such amounts which are payable as on 31st March of the year under consideration?

2. Whether decision of Special Bench of the Tribunal in the case of M/s. Merilyn Shipping & Transports vs. ACIT (supra) lays down correct law?"

6. Counsel for the Revenue contended that the Tribunal has committed serious error in holding that provision of Section 40(a)(ia) of the Act would apply only when the amount has remained payable till the end of the accounting year. They pointed out that the word "payable" has not been defined under the Act and the same would, in the context of the provision under consideration, include the expression "paid". Any other interpretation would lead to absurd results. They contended that the interpretation which advances the true meaning of the provision should be adopted and not one which frustrates the provision.

7. In this respect reliance was placed on the following decisions:-

(1) In the case of K.P.Varghese vs. Income-Tax Officer, Ernakulam, and another reported in [1981] 131 ITR 597 = ***(2O02-TIOL-128-SC-IT),*** *in which it was observed that "It is a well recognized rule of construction that the statutory provision must be so construed, if possible, that absurdity and mischief may be avoided."*

(2) In the case of Commissioner of Income-Tax, Bangalore vs. J.H. Golta reported in [1985] 156 ITR 323 = ***(2002-TIOL-131-SC-IT),*** *in which it was observed that "Where the plain literal interpretation of a statutory provision produces a manifestly unjust result, which could never have been intended by the legislature, the Court might modify the language used by the legislature so as to achieve the intention of the legislature and produce rational construction."*

(3) In the case of C.W.S.(India) Ltd. vs. Commissioner of Income-Tax reported in [1994] 208 ITR 649, in which it was observed that "While we agree that literal construction may be the general rule in construing taxing enactments, it does not mean that it should be adopted even if it leads to a discriminatory or incongruous result. Interpretation of statutes cannot be a mechanical exercise."

8. Counsel also contended that interpretation made by the Tribunal leads to results wholly unintended by the legislature. If disallowance under Section 40(a)(ia) is applied only in case of amounts payable as on 31st March of the year under consideration, in large number of cases where the assessees might have actually paid the amounts but might not have either deducted tax at source though required under the Act or even after deduction not deposited with the Government, would escape the consequences envisaged under the said provision. It was further contended that Section 40(a)(ia) of the Act in its plain language does not permit such interpretation adopted by the Tribunal in the case of M/s. Merilyn Shipping & Transports vs. ACIT(supra). Even on the premise of literal construction, the view adopted by the Tribunal should be rejected.

9. On the other hand, counsel appearing for the assessees supported the view of the Tribunal. They contended that in taxing statute there is no room for intendment. The provisions must be construed strictly on the basis of plain language used by the legislature. According to them only meaning that can be ascribed to Section 40(a)(ia) of the Act is that the disallowance can be made in respect of amounts, which are payable but not yet paid till 31st March of the year under consideration and no other.

10. It was contended that the provision in question is exproprietary since it disallows entire expenditure for not deducting a small portion of tax at source. It is thus in a nature of penalty. It was contended that in any case, Section 40(a)(ia) creates deeming fiction where the sum . though not an income of the assessee is taxed as such. It was, therefore, contended that such provision should be interpreted strictly and narrowly. Even if the intention of the legislature may not have been to limit such provision, if the plain language of the section permits no other meaning, this Court cannot and would not expand the meaning of the section to cover any legislative imperfections or errors.

11. It was strongly contended that terms "payable" and "paid" are not synonymous. Section 40(a)(ia), therefore, when uses the expression "payable", such term must be given its ordinary meaning and the expression "paid", cannot be read into it. Counsel further submitted that the Finance Bill No.2 of 2004 under which Section 40 of the Act was proposed to be amended to include clause (a)(ia) originally used different language. In place of the word "payable" expression used was "amount credited or paid". In the amendment, which was ultimately brought about, the said expression was consciously dropped. Thus, there was conscious omission on the part of the legislature. They, therefore, contended with all the more

force that the term "payable" used in Section 40(a)(ia) of the Act would not include expression "paid". They pointed out that term "paid" has been defined under section 43(2) of the Act whereas the word "payable" has not been defined in the Act.

12. In support of the contentions they relied on the following decision:-

In the case of Mugat Dyeing and Printing Mills vs. Assistant Commissioner of Income-Tax reported in [2007] 290 ITR 282 (Guj), in which the Division Bench of this Court in the context of Section 43B of the Act observed that the expression employed in the said section is "actually paid" and in view of the non-obstante clause contained in the said Section, it would not be permissible to refer to the expression "paid" as defined under section 43(2) of the Act. This decision, however, was rendered in the background of Section 43B of the Act, which used the expression "actually paid".

Reliance was placed in the case of Commissioner of Income-Tax vs. Upnishad Investment P. Ltd and others reported in [2003] 260 ITR 532, wherein the Division Bench of this Court had an occasion to interpret expressions "receivable" and "due". It was observed that expressions "receivable" is used with reference to the recipient and the word "payable" is used with reference to the payer.

13. Our attention was drawn to the decision of the Supreme Court in the case of Commissioner of Income-Tax, Gujarat vs. Ashokbhai Chimanbhai reported in [1965] 56 ITR 42, wherein while explaining the concept of taxability of income, when it accrues, arises or is received, it was observed that the receipt is not the only test of chargeability to tax and if income accrues or arises, it may become liable to tax. In this context, it was observed that "Working of company from day to day would certainly not indicate any profit or loss, even working of the company from month to month could not be taken as a reliable guide for this purpose. If the profit or loss has to be ascertained by comparison of the assets at two stated points, the most businesslike way would be to do so at stated intervals of one year and that would be a reasonable period to be adopted for the purpose." On the basis of such observations it was canvassed that the payability of the sum as referred to in Section 40(a)(ia) of the Act must be judged as on 31st March of the particular year.

14. Counsel have also referred to various judgments in support of the contention that in the present case, strict interpretation is called for. It is not necessary to refer to such decisions.

15. Chapter XVII-A of the Act pertains to collection and recovery of the tax. Part-A thereof is general. Part-B of Chapter XVII pertains to deduction at source. Several provisions have been made in the said Chapter fastening the liability on the payee to deduct tax at source and deposit with the Government. For example, sub-Section (1) of Section 194A of the Act provides that any person, not being an individual or an Hindu undivided family, who is responsible for paying to a resident any income by way of interest other than

the 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. Likewise Section 194C of the Act provides that any person responsible for paying any sum to any resident (referred to as a contractor) for carrying out any work including supply of labour in pursuance of a contract between the contractor and the specified person, 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 the amount specified in the said provision as income-tax on income comprised therein. Section 200 of the Act pertains to duty of person deducting tax. Sub-Section (1) thereof provides that any person deducting any sum in accordance with the foregoing provisions of the Chapter, shall pay within the prescribed time, the sum so deducted to the credit of the Central Government or as the Board directs. Section 201 provides for consequences of failure to deduct or pay tax at source. Sub-Section (1) thereof, in essence, provides that any person, who is required to deduct any sum in accordance with the provisions of the Act or referred to in sub-Section (1) of Section 192 being an employer but does not deduct or does not pay or after so deducting fails to pay whole or part of the tax as required under the Act, then such person shall, without prejudice to any other consequences which he may incur, be deemed to be an assessee in default in respect of the said tax. Section 271C of the Act provides for penalty for failure to deduct tax at source.

16. In addition to such provisions already existing, the legislature introduced yet another provision for ensuring compliance with the requirement of deducing tax at source and depositing it with the Central Government. Section 40(a)(ia) relevant for our purpose reads as under:-

> *"(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 subsection (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(l) 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."*

17. In plain terms Section 40(a)(ia) provides that in case of 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 for carrying out any work on which tax is deductible at source and such tax has not been deducted or

after deduction has not been paid before the due date, such amounts shall not be deducted in computing the income chargeable under the head "Profits and Gains of Business or Profession" irrespective of the provisions contained in Sections 30 to 38 of the Act. Proviso to Section 40(a)(ia), however, enables the assessee to take such deduction in subsequent year, if tax is deducted in such year or though deducted during the previous year but paid after the due date specified in sub-Section(1) of Section 139 of the Act.

18. In such context, therefore, the question arises whether under Section 40(a)(ia) of the Act disallowance of the expenditure payment of which, though required deduction of tax at source has not been made would be confined only to those cases where the amount remains payable till the end of the previous year or would include all amounts which became payable during the entire previous year.

19. Decision in the case of M/s. Merilyn Shipping & Transports vs. ACIT (supra) was rendered by the Special Bench by a split opinion. Learned Accountant Member who was in minority, placed heavy reliance on a decision of Madras High Court in the case of Tube Investments of India Ltd. and another vs. Assistant Commissioner of Income-Tax (TDS) and others reported in [2010] 325 ITR 610 (Mad) = (2O09-TIOL-529-HC-MAD-IT). Learned Judge did notice that the High Court in such case was concerned with the vires of the statutory provision but found some of the observations made by the Court in the process useful and applicable. Learned Judge rejected the theory of narrow interpretation of term "payable" and observed as under:

> *"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."*

20. On the other hand, learned Judicial Member speaking for majority adopted a stricter interpretation. Heavy reliance was placed on the Finance Bill of 2004, which included the draft of the amendment in Section 40 and the ultimate amendment which actually was passed by the Parliament. It was observed that from the comparison between the proposed and the enacted provision it can be seen that the legislature has replaced the words "amounts credited or paid" with the word "payable" in the enactment. On such basis, it was held that this is a case of conscious omission and when the language was clear the intention of the legislature had to be gathered from language used. In their opinion the provision would apply only to amounts which are payable at the end of the year. Having said so, curiously, it was observed that the proviso to Section 40(a)(ia) of the Act lays down that earlier year's provision can be allowed in subsequent years only if

IDS is deducted and deposited and, therefore, Revenue's fear is unfounded as the provision of Section 40(a)(ia) of the Act covers the situation.

21. In the present case, we have no hesitation in accepting the contention that the provision must be construed strictly. This being a provision which creates an artificial charge on an amount which is otherwise not an income of the assessee, cannot be liberally construed. Undoubtedly if the language of the section is plain, it must be given its true meaning irrespective of the consequences. We have noticed that the provision makes disallowance of an expenditure which has otherwise been incurred and is eligible for deduction, on the ground that though tax was required to be deducted at source it was not deducted or if deducted, had not been deposited before the due date. By any intendment or liberal construction of such provision, the liability cannot be fastened if the plain meaning of the section does not so permit.

22. For the purpose of the said section, we are also of the opinion that the terms "payable" and "paid" are not synonymous. Word "paid" has been defined in Section 43(2) of the Act to mean actually paid or incurred according to the method of accounting, upon the basis of which profits and gains are computed under the head "Profits and Gains of Business or Profession". Such definition is applicable for the purpose of Sections 28 to 41 unless the context otherwise requires. In contrast, term "payable" has not been defined. The word "payable" has been described in Webster's Third New International Unabridged Dictionary as requiring to be paid: capable of being paid: specifying payment to a particular payee at a specified time or occasion or any specified manner. In the context of section 40(a)(ia), the word "payable" would not include "paid". In other words, therefore, an amount which is already paid over ceases to be payable and conversely what is payable cannot be one that is already paid. When as rightly pointed out by Counsel Mr. Hemani, the Act uses terms "paid" and "payable" at different places in different context differently, for the purpose of Section 40(a)(ia) of the Act, term "payable" cannot be seen to be including the expression "paid". The term "paid" and "payable" in the context of Section 40(a)(ia) are not used interchangably. In the case of Birla Cement Works and another vs. State of Rajasthan and another reported in AIR 1994 (SC) 2393, the Apex Court observed that "the word payable is a descriptive word, which ordinarily means that which must be paid or is due or may be paid but its correct meaning can only be determined if the context in which it is used is kept in view. The word has been frequently understood to mean that which may, can or should be paid and is held equivalent to "due".

23. Despite this narrow interpretation of section 40(a)(ia), the question still survives if the Tribunal in case of M/s. Merilyn Shipping & Transports vs. ACIT (supra) was accurate in its opinion. In this context, we would like to examine two aspects. Firstly, what would be the correct interpretation of the said provision. Secondly, whether our such understanding of the language used by the legislature should

waver on the premise that as propounded by the Tribunal, this was a case of conscious omission on part of the Parliament. Both these aspects we would address one after another. If one looks closely to the provision, in question, adverse consequences of not being able to claim deduction on certain payments irrespective of the provisions contained in Sections 30 to 38 of the Act would flow if the following requirements are satisfied:-

(a) There is interest, commission or brokerage, rent, royalty, fees for professional services or fees for technical services payable to resident or amounts payable to a contractor or subcontractor being resident for carrying out any work.

(b) These amounts are such on which tax is deductible at source under Chapter XVII-B.

(c) Such tax has not been deducted or after deduction has not been paid on or before due date specified in sub-Section (1) of Section 39.

For the purpose of current discussion reference to the proviso is not necessary.

24. What this Sub-Section, therefore, requires is that there should be an amount payable in the nature described above, which is such on which tax is deductible at source under Chapter XVII-B but such tax has not been deducted or if deducted not paid before the due date. This provision nowhere requires that the amount which is payable must remain so payable throughout during the year. To reiterate the provision has certain strict and stringent requirements before the unpleasant consequences envisaged therein can be applied. We are prepared to and we are duty bound to interpret such requirements strictly. Such requirements, however, cannot be enlarged by any addition or subtraction of words not used by the legislature. The term used is interest, commission, brokerage etc. is payable to a resident or amounts payable to a contractor or sub-contractor for carrying out any work. The language used is not that such amount must continue to remain payable till the end of the accounting year. Any such interpretation would require reading words which the legislature has not used. No such interpretation would even otherwise be justified because in our opinion, the legislature could not have intended to bring about any such distinction nor the language used in the section brings about any such meaning. If the interpretation as advanced by the assessees is accepted, it would lead to a situation where the assessee who though was required to deduct the tax at source but no such deduction was made or more flagrantly deduction though made is not paid to the Government, would escape the consequence only because the amount was already paid over before the end of the year in contrast to another assessee who would otherwise be in similar situation but in whose case the amount remained payable till the end of the year. We simply do not see any logic why the legislature would have desired to bring about such irreconcilable and diverse consequences. We hasten to add that this is not the prime basis on which we have adopted the interpretation which we have given. If the language used by the Parliament conveyed such a meaning, we would not have hesitated in adopting such an interpretation. We only highlight

that we would not readily accept that the legislature desired to bring about an incongruous and seemingly irreconcilable consequences. The decision of the Supreme Court in the case of Commissioner of Income-Tax, Gujarat vs. Ashokbhai Chimanbhai (supra), would not alter this situation. The said decision, of course, recognizes the concept of ascertaining the profit and loss from the business or profession with reference to a certain period i.e. the accounting year. In this context, last date of such accounting period would assume considerable significance. However, this decision nowhere indicates that the events which take place during the accounting period should be ignored and the ascertainment of fulfilling a certain condition provided under the statute must be judged with reference to last date of the accounting period. Particularly, in the context of requirements of Section 40(a)(ia) of the Act, we see no warrant in the said decision of the Supreme Court to apply the test of payability only as on 31st March of the year under consideration. Merely because, accounts are closed on that date and the computation of profit and loss is to be judged with reference to such date, does not mean that whether an amount is payable or not must be ascertained on the strength of the position emerging on 31st March.

25. This brings us to the second aspect of this discussion, namely, whether this is a case of conscious omission and therefore, the legislature must be seen to have deliberately brought about a certain situation which does not require any further interpretation. This is the fundamental argument of the Tribunal in the case of M/s. Merilyn Shipping & Transports vs. ACIT(supra) to adopt a particular view.

26. While interpreting a statutory provision the Courts have often applied Hyden's rule or the mischief rule and ascertained what was the position before the amendment, what the amendment sought to remedy and what was the effect of the changes.

27. In the case of Bengal Immunity Co. Ltd. vs. State of Bihar and others reported in AIR 1955 SC 661, the Apex Court referred to the famous english decision in Hyden's case wherein while adopting restrictive or enlarging interpretation, it was observed that four things are to be considered, (1) what was the common law before making of the act (2) what was the mischief and defect in which the common law did not provide. (3) what remedy the Parliament had resolved and adopted to cure the disease and (4) true reason of the remedy.

28. In such context, the position prevailing prior to the amendment introduced in Section 40(a) would certainly be a relevant factor. However, the proceedings in the Parliament, its debates and even the speeches made by the proposer of a bill are ordinarily not considered as relevant or safe tools for interpretation of a statute. In the case of Aswini Kumar Chose and another vs. Arabinda Bose and another reported in A.I.R. 1952 SC 369 in a Constitution Bench decision of (Coram: Patanjali Sastri, CJ.), observed that:-

"33. .....It was urged that acceptance or rejection of amendments to a Bill in the course of Parliamentary proceedings forms part of the pre-enactment history of a

statute and as such might throw valuable light on the intention of the Legislature when the language used in the statue admitted of more than one construction. We are unable to assent to this preposition.

The reason why a particular amendment was proposed or accepted or rejected is often a matter of controversy, as it happened to be in this case, and without the speeches bearing upon the motion, it cannot be ascertained with any reasonable degree of certainty. And where the Legislature happens to be bicameral, the second Chamber may or may not have known of such reason when it dealt with the measure. We hold accordingly that all the three forms of extrinsic aid sought to be resorted to by the parties in the case must be excluded from consideration in ascertaining the true object and intention of the Legislature."

29. In yet another Constitution Bench judgment in the case of A.K.Gopalan vs. State of Madras reported in AIR 1950 SC 27, it was observed as under: -

"17.....The result appears to be that while it is not proper to take into consideration the individual opinions of members of Parliament or Convention to construe the meaning of the particular clause, when a question is raised whether a certain phrase or expression was up for consideration at all or not, a reference to the debates may be permitted."

30. In the case of Express Newspaper (Private) Ltd. and another vs. The Union of India and others reported in AIR 1958 SC 578, N.H.Bhagwati, J., observed as under:-

"173. We do not propose to enter into any elaborate discussion on the question whether it would be competent to us in arriving at a proper construction of the expression "fixing rates of wages" to look into the Statement of Objects and Reasons attached to the Bill No. 13 of 1955 as introduced in the Rajya Sabha or the circumstances under which the word "minimum" came to be deleted from the provisions of the Bill relating to rates of wages and the Wage Board and the fact of such deletion when the act came to be passed in its present form. There is a consensus of opinion that these are not aids to the construction of the terms of the Statute which have of course to be given their plain and grammatical meaning (See: Ashvini Kumar ghosh v. Arabinda Bose, 1953 SC R 1:(AIR 1952 SC 369) (Z24) and Provat Kumar Kar v. William Trevelyan Curtiez Parker, AIR 1950 Cal 116 (Z25), It is only when the terms of the statute are ambiguous or vague that resort may be had to them for the purpose of arriving at the true intention of the Legislature."

31. It can thus be seen that the debates in the Parliament are ordinarily not considered as the aids for interpretation of the ultimate provision which may be brought into the statute. The debates at best indicate the opinion of the individual members and are ordinarily not relied upon for interpreting the provisions, particularly when the provisions are plain. We are conscious that departure is made in two exceptional cases, namely, the debates in the Constituent Assembly and in case of Finance Minister's speech explaining the reason for introduction of a certain provision. The reason why a certain language was used in

a draft bill and why the provision ultimately enacted carried a different expression cannot be gathered from mere comparison of the two sets of provisions. There may be variety of reasons why the ultimate provision may vary from the original draft. In the Parliamentary system, two Houses separately debate the legislations under consideration. It would all the more be unsafe to refer to or rely upon the drafts, amendments, debates etc for interpretation of a statutory provision when the language used is not capable of several meanings. In the present case the Tribunal in case of M/s. Merilyn Shipping & Transports vs. ACIT (supra) fell in a serious error in merely comparing the language used in the draft bill and final enactment to assign a particular meaning to the statutory provision.

32. It is, of course, true that the Courts in India have been applying the principle of deliberate or conscious omission. Such principle is applied mainly when an existing provision is amended and a change is brought about. While interpreting such an amended provision, the Courts would immediately inquire what was the statutory provision before and what changes the legislature brought about and compare the effect of the two. The other occasion for applying the principle, we notice from various decisions of the Supreme Court, has been when the language of the legislature is compared with some other analogous statute or other provisions of the same statute or with expression which could apparently or obviously been used if the legislature had different intention in mind, while framing the provision. We may refer to some of such decisions presently. In the case of Bhuwalka Steel Industries Ltd. vs. Bombay Iron and Steel Labour Board reported in AIR 2010 (Suppl.) 122, the Apex Court observed as under:-

"The omission of the words as proposed earlier from the final definition is a deliberate and conscious act on the part of the legislature, only with the objective to provide protection to all the labourers or workers, who were the manual workers and were engaged or to be engaged in any scheduled employment. Therefore, there was a specific act on the part of the legislature to enlarge the scope of the definition and once we accept this, all the arguments regarding the objects and reasons, the Committee Reports, the legislative history being contrary to the express language, are relegated to the background and are liable to be ignored."

33. In the case of Agricultural Produce Market Committee, Narela, Delhi vs. Commissioner of Income Tax and anr. reported in AIR 2008 SC (Supplement) 566 = ***(2008-TIOL-155-SC-IT),*** *the Supreme Court noticed that prior to Finance Act, 2002, the Income Tax Act did not contain the definition of words "Local Authority". The word came to be defined for the first time by the Finance Act of 2002 by explanation/ definition clause to Section 10(20) of the Act. It was further noticed that there were significant difference in the definition of term "local authority" contained under Section 3(31) of the General Clauses Act, 1987 as compared to the definition - clause inserted in Section 10(20) of the Income Tax Act, 1961 vide Finance Act, of 2002. In this context it was observed that:-*

"27. Certain glaring features can be deciphered from the above comparative chart. Under Section 3(31) of

the General Clauses Act, 1897, "local authority" was defined to mean " a municipal committee, district board, body of port commissioners or other authority legally entitled to the control or management of a municipal or local fund. The words " other authority" in Section 3(31) of the 1897 Act has been omitted by Parliament in the Explanation/ definition clause inserted in Section 10(20) of the 1961 Act vide Finance Act, 2002. Therefore, in our view, it would not be correct to say that the entire definition of the word "local authority" is bodily lifted from Section 3(31) of the 1897 Act and incorporated, by Parliament, in the said Explanation to Section 10(20) of the 1961 Act. This deliberate omission is important."

34. The Apex Court in the case of Greater Bombay Cooperative Bank Ltd. vs. M/s. United Yarn Tex. Pvt. Ltd & Ors. reported in AIR 2007 SC 1584, in the context of question whether the Cooperative Banks transacting business of banking fall within the meaning of 'banking company' defined in the Banking Regulation Act, 1949, observed as under:-

"59. The RDB Act was passed in 1993 when Parliament had before it the provisions of the BR Act as amended by Act No.23 of 1965 by addition of some more clauses in Section 56 of the Act. The Parliament was fully aware that the provisions of the BR Act apply to co-operative societies as they apply to banking companies. The Parliament was also aware that the definition of 'banking company' in Section 5(c) had not been altered by Act No.23 of 1965 and it was kept intact, and in fact additional definitions were added by Section 56(c)."Co-operative bank" was separately defined by the newly inserted clause (cci) and "primary co-operative bank" was similarly separately defined by clause (ccv). The Parliament was simply assigning a meaning to words; it was not incorporating or even referring to the "'substantive provisions of the BR Act. The meaning of 'banking company' must, therefore, necessarily be strictly confined to the words used in Section 5(c) of the BR Act, It would have been the easiest thing for Parliament to say that 'banking company' shall mean 'banking company' as defined in Section 5(c) and shall include 'co-operative bank' as defined in Section 5(cci) and 'primary co-operative bank' as defined in Section 5(ccv). However, the Parliament did not do so. There was thus a conscious exclusion and deliberate commission of co-operative banks from the purview of the RDB Act. The reason for excluding cooperative banks seems to be that co-operative banks have comprehensive, self-contained and less expensive remedies available to them under the State Co-operative Societies Acts of the States concerned, while other banks and financial institutions did not have such speedy remedies and they had to file suits in civil courts."

35. In the case of National Mineral Development Corporation Ltd. vs. State of M.P and another reported in AIR 2004 SC 2456, the Apex Court observed as under:-

"29. The Parliament knowing it full well that the iron ore shall have to undergo a process leading to emergence of lumps, fines, concentrates and slimes chose to make provision for quantification of royalty only by reference to the quantity of lumps, fines and concentrates. It left slimes out of consideration. Nothing prevented the Parliament from either providing for the quantity of iron ore as such as the basis for quantification of royalty. It chose to make provision for the quantification being awaited until the emergence of lumps, fines and concentrates. Having done so the Parliament has not said "fines including slimes". Though 'slimes' are not 'fines' the Parliament could have assigned an artificial or extended meaning to 'fines' for the purpose of levy of Royalty which it has chosen not to do. It is clearly suggestive of its intention not to take into consideration 'slimes' for quantifying the amount of royalty. This deliberate omission of Parliament cannot be made good by interpretative process so as to charge royalty on 'slimes' by reading Section 9 of the Act divorced from the provisions of the Second Schedule. Even if slimes were to be held liable to charge of royalty, the question would still have remained at what rate and on what quantity which questions cannot be answered by Section 9."

36. In the case of Gopal Sardar, vs. Karuna Sardar reported in AIR 2004 SC 3068, the Apex . Court in the context of limitation within which right of preemption must be exercised and whether in the context of the relevant provisions contained in West Bengal Land Reforms and Limitation Act, 1963 applied or not, observed as under:-

"8....Prior to 15-2-1971, an application under Section 8 was required to be made to the "Revenue Officer specifically empowered by the State Government in this behalf." This phrase was substituted by the phrase "Munsif having territorial jurisdiction" by the aforementioned amendment. Even after this amendment when an application is required to be made to Section 8 of the Act either to apply Section 5 of the Limitation act or its principles so as to enable a party to make an application after the expiry of the period of limitation prescribed on showing sufficient cause for not making an application within time. The Act is of 1955 and for all these years, no provision is made under Section 8 of the Act providing for condonation of delay. Thus, when Section 5 of the Limitation Act is not made applicable to the proceedings under Section 8 of the Act unlike to the other proceedings under the Act, as already stated above, it is appropriate to construe that the period of limitation prescribed under Section 8 of the Act specifically and expressly governs an application to

be made under the said section and not the period prescribed under Article 137 of the Limitation Act."

37. In our opinion, the Tribunal committed an error in applying the principle of conscious omission in the present case. Firstly, as already observed, we have serious doubt whether such principle can be applied by comparing the draft presented in Parliament and ultimate legislation which may be passed. Secondly, the statutory provision is amply clear.

38. In the result, we are of the opinion that Section 40(a)(ia) would cover not only to the amounts which are payable as on 31th March of a particular year but also which are payable at any time during the year. Of course, as long as the other requirements of the said provision " exist. In that context, in our opinion the decision of the Special Bench of the Tribunal in the case of M/s. Merilyn Shipping & Transports vs. ACIT (supra), does not lay down correct law.

39. We answer the questions as under:-

Question (1) in the negative i.e. in favour of the Revenue and against the assessees.

Question (2) also in the negative i.e. in favour of the Revenue and against the assessees.

40. All Tax Appeals are allowed. Decisions of the Tribunal under challenge are reversed. In the earlier portion of the judgment, we had recorded that the Tribunal in all cases had proceeded only on this short basis without addressing other issues. We, therefore, place all these matters back before the Tribunal for fresh consideration of other issues, if any, regarding disallowance under Section 40(a)(ia) of the Act. All appeals are disposed of accordingly."

8.3 However, we find although the above 2 decisions were rendered prior to the hearing before the Hon'ble Allahabad High Court the same were not brought to the notice of the Hon'ble Bench and the Bench relying on the decision of the Special Bench in the case of Merilyn Shipping and Transport Ltd. (Supra) upheld the decision of the Tribunal. Under these circumstances, following the decision of the Hon'ble Gujarat High Court and Hon'ble Calcutta High Court (Supra) we uphold the order of the CIT(A) sustaining the disallowance made by the Assessing Officer. We further find the Co-ordinate Bench of the Tribunal in the case of ACIT Vs. Shri Bharat Dhanpal Patil vide ITA No.600/PN/2012 order dated 30-07-2013 following the decision of Hon'ble Calcutta High Court and Gujarat High Court cited (Supra) had allowed the appeal filed by the revenue wherein the CIT(A) had held that provisions of section 40(a)(ia) would apply when the amount is payable and where the expenditure is paid. The argument of the Ld.counsel for the assessee that when two views are possible the view favourable to the assessee has to be followed in view of the decision of the Hon'ble Supreme Court in the case of CIT Vs. Vegetable Products Ltd.(Supra) is not applicable to the facts and circumstances of the present case. In this view of the matter, we uphold the order of the CIT(A) and the grounds raised by the assessee are dismissed.

9. In the result, the appeal filed by the assessee is dismissed."

4. Following the aforesaid precedent, we hereby reverse the decision of the CIT(A). However, at the time of hearing, the Ld. Representative for the respondent-assessee made a new legal argument that second proviso to section 40(a)(ia) of the Act was inserted by Finance Act, 2012 w.e.f. 01.04.2013, whereby it is provided that the disallowance u/s 40(a)(ia) of the Act would not be made if the assessee is not deemed to be an assessee in default under the first proviso to section 201(1) of the Act. The stand of the assessee is that the said proviso should be understood as retrospective in nature as it has been introduced to eliminate unintended consequences which may cause undue hardships to the tax payers. It was pointed out that in similar circumstances, the Pune Bench of the Tribunal in the case of ITO vs. M/s Gaurimal Mahajan & Sons vide ITA No.1852/PN/2012 dated 06.01.2014 following the decision of the Cochin Bench of the Tribunal in the case of Antony D. Mundackal vs. ACIT vide ITA No.38/Coch/2013 dated 29.11.2013 has restored the matter back to the file of the Assessing Officer. In the precedent dated 06.01.2014 (supra), the Tribunal noted that such a plea was raised for the first time before the Tribunal and the correctness or otherwise of the contentions raised was not examined by the lower authorities. Therefore, the Tribunal restored the matter back to the file of the Assessing Officer for examination afresh, following the decision of the Cochin Bench of the Tribunal in the case of Antony D. Mundackal (supra) in a similar circumstance. The Ld. Representative submitted that the matter be restored back to the file of the Assessing Officer in the light of the order of the Tribunal dated 06.01.2014 (supra). The aforesaid plea of the respondent-assessee has not been seriously opposed by the Ld. Departmental Representative appearing for the Revenue.

5. Following the aforesaid precedent, we therefore deem it fit and proper to restore the matter back to the file of the Assessing Officer who shall consider the plea of the assessee based on the second proviso to section

40(a)(ia) of the Act inserted by the Finance Act w.e.f. 01.04.2013 in the light of the directions of the Tribunal contained in its order dated 06.01.2014 (supra). Needless to say, the Assessing Officer shall allow the assessee a reasonable opportunity of being heard before passing an order afresh on this aspect as per law.

6. In the result, the appeal of the assessee is treated as allowed for statistical purposes.

Order pronounced on 18th March, 2015.

Sd/-	**Sd/-**
(SUSHMA CHOWLA)	**(G.S. PANNU)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Pune, Dated: 18th March, 2015.

Sujeet

Copy of the order is forwarded to: -

1) The Assessee;
2) The Department;
3) The CIT(A), Aurangabad;
4) The CIT, Aurangabad;
5) The DR "A" Bench, I.T.A.T., Pune;
6) Guard File.

By Order

//True Copy//

Assistant Registrar
I.T.A.T., Pune