IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

1. **ITA No.716 of 2009** (O&M)
RESERVED ON: 24.03.2015
DATE OF DECISION:29.04.2015

P.M.S Diesels

…..Appellant

versus

Commissioner of Income-tax-2, Jalandhar

.....Respondent

2. **ITA No.130 of 2012**

Torque Pharmaceuticals Pvt. Ltd. …..Appellant

versus

Commissioner of Income Tax-I, Chandigarh ….Respondent

3. **ITA No.171 of 2014**

M/s Rana Polycot Ltd.

…..Appellant

versus

Commissioner of Income Tax, Chandigarh

….Respondent

4. **ITA No.188 of 2014**

M/s Ind Swift Laboratories Ltd.

…..Appellant

versus

Commissioner of Income Tax, Chandigarh

….Respondent

CORAM:- HON'BLE MR.JUSTICE S.J.VAZIFDAR, ACTING CHIEF JUSTICE
HON'BLE MR. JUSTICE G.S.SANDHAWALIA

Present: Mr. Ravish Sood, Advocate for the assessee in ITA-716-2009

Mr. Ravi Shankar, Mr. B.M. Monga &
Mr. Rohit Kaura, Advocates for the assessees in
ITA Nos.130 of 2012, 171 and 188 of 2014

Mr. Vivek Sethi, Advocate for the revenue in
ITA-716-2009

Ms. Urvashi Dhugga, Advocate for the revenue in
ITA Nos.130 of 2012, 171 and 188 of 2014

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S.J. VAZIFDAR, ACTING CHIEF JUSTICE:

The appeals raise a common question of law and are, therefore, disposed off by this common order and judgment. We will refer to the facts from ITA No.716 of 2009, which pertains to the Assessment Year 2005-06.

2. ITA No.716 of 2009 and ITA No.130 of 2012 were admitted on the substantial questions of law which we will refer to shortly. In ITA No.171 of 2014 and ITA No.188 of 2014 the substantial questions of law had not been framed. However, the only question of law raised before us was whether the disallowance contemplated by Section 40(a)(ia) can be applied when payments in respect of which tax is deductible at source has already been made by the assessee to the payee at the time of computing the income chargeable under the head "profits and gains of business or profession" i.e. at the close of the year. The other two appeals are also admitted on this question of law. This judgment is, therefore, restricted to this question alone.

3. We have answered the question against the assessee/respondent. In doing so, we have also held that the requirement to deduct tax at source is mandatory and that the provisions of section 40(a)(ia) apply to assessees who follow the cash system as well as assessees who follow the mercantile system.

4. We will, however, for the record, refer to the questions of law raised in ITA No.716 of 2009 and ITA No.130 of 2012.

ITA No.716 of 2009 was admitted by an order of a Division Bench dated 27.05.2010 on the following substantial questions of law:-

> "1. Whether the Tribunal had erred in law by failing to appreciate that the CIT (Appeal) by resorting to the cardinal rule of strict literal interpretation rightly interpreted the scope of applicability of Section 40(a)(ia) of the Income-tax Act, 1961, and had therein rightly restricted the disallowances as contemplated in the said section to the amounts 'PAYABLE' to the contractor or sub-contractor at the time of computing the income chargeable under the head "Profits and Gains of Business of Profession", in respect of which amounts the appellant firm had defaulted under the TDS provisions".
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> 2. Whether the Tribunal is right in law in brushing aside the purposive, conscious and intentional usage of the term 'PAYABLE' by the legislature in all its wisdom in Sec.40(a)(ia) of the 'Act', and substituting the same by the term 'PAID', in the name of giving effect to the supposed underlying object behind the said enactment?

3. Whether the Tribunal while interpreting the scope of applicability of Sec.40(a)(ia) of the 'Act' is right in law in brushing aside the settled rule of construction recognised by the Hon'ble Apex Court that if two reasonable constructions of a taxing provision are possible, then that construction which favours the assessee must be adopted?"

5. ITA No.130 of 2012 was admitted by an order dated 19.07.2013 on the following substantial questions of law:-

"1. Whether the ITAT is justified in upholding that the appellant was liable to deduct the tax at source on the freight charges reimbursed by way of credit notes to its distributors which does not give rise to any income in the hands of the recipients and as per Section 4(1) read with Section 190 of the IT Act, 1961, particularly when the TDS even if deducted the payees could not claim its credit under Section 199?

2. Whether the order of the Tribunal is perverse as the provisions of Section 194C are not applicable in the instant case because the payment of the freight to the transporters was responsibility and liability of the distributors and

only the reimbursement, by way of credit notes, was made at a later date by the appellant and as per clause (vi) of the agreement distributors were required to make the payment to the transporter and deduct tax at source which liability cannot be fastened to the appellant?

3. Whether the Tribunal is justified in re-allocating the common expenses to the both the units on sales basis ignoring the fact that the Baddi Unit came into existence on 1.1.2006 and cannot be linked with any expenditure prior to that or say upto 31.12.2005, which is attributable only to the Dera Bassi Unit?"

6. The interpretation of Section 40(a)(ia) is what really falls for consideration. Mr. Sood, the learned counsel appearing on behalf of the appellant contended that the disallowance contemplated by Section 40(a)(ia) cannot be applied when payment has already been made by the assessee to the payee (in this case, a contractor) at the time of computing the income chargeable under the head "profits and gains of business or profession" i.e. at the close of the year.

7. The appellant filed its income-tax return declaring a net income of Rs.15,93,200/- as on 11.10.2005. The case was picked up for scrutiny assessment under Section 143(2) of the Act. The appellant produced the bills, vouchers and other records indicating expenses such as freight, wages, advertisement and publicity. The

Assessing Officer, however, found that the TDS return for the Financial Year 2004-05 corresponding to the assessment year in question along with proof of payment of TDS was not submitted. The Assessing Officer noted that the assessee's books of accounts, however, recorded that the TDS had been deposited in the government account. The appellant's accountant admitted that TDS had not been deducted in respect of the payments made/deemed to have been made by the appellant, who follows the mercantile system. He also admitted that the TDS deducted had not been deposited to the credit of the Central Government. The Assessing Officer, accordingly, in view of Section 40(a)(ia) disallowed the expenses relating to the amounts in respect whereof TDS was liable to be deducted and paid. The Assessing Officer disallowed the aggregate expenses of Rs.40,98,544/- under Section 40(a)(ia) and added the same to the assessee's total income.

At the hearing before us, the appellant proceeded on the basis that payments had been made in respect whereof tax was liable to be deducted at source but had not been deducted and, in any event, had not been deposited in the government account. It is not necessary to refer to the various defaults in this regard for the matter proceeded on the basis that the appellant had not deducted the tax at source and even if they had done so they had not deposited the same in the government account.

8. The appellant filed appeals before the Commissioner of Income Tax (Appeals). The CIT (Appeals) found that out of the job work charges of Rs.25,24,109/- only a sum of Rs.7,65,807/- remained payable on which tax was not deducted, out of the publicity expenses, a sum of only Rs.53,542/- remained payable on which tax

was not deducted and under other heads i.e. shipping expenses, legal expenses, freight inward, clearing and forwarding charges, the entire amount of expenditure was paid and nothing remained payable. In respect of an amount of Rs.25,094/- although tax was not deducted, it was paid. The CIT (Appeals) disagreed with the Assessing Officer that the word "payable" under Section 40(a)(ia) refers to the amount payable from the beginning of the year and not to the amount payable at the close of the year. The Assessing Officer had disallowed the amount of Rs.40,98,544/-. The CIT (Appeals), however, reduced the disallowance to Rs.8,19,349/- which was the sum of Rs.7,65,807/- and Rs.53,542/- which remained payable and in respect of which the tax was not deducted at source and, in any event, was not paid to the Government account.

9. The Tribunal rightly accepted the case of the revenue. The Tribunal rightly held that if an assessee is liable to deduct and pay over TDS under Section 194C and the assessee fails to do so, the payments in respect of which the TDS was to be deducted and paid over are to be disallowed in view of Section 40(a)(ia).

10. While construing Section 40(a)(ia), it will be necessary to also refer to the provisions of Chapter XVII, Part-B (hereafter for convenience referred to as "Chapter XVII-B"). The relevant provisions are as follows:-

> "40. Notwithstanding anything to the contrary in sections 30 to 38, the following amounts shall not be deducted in computing the income chargeable under the head "Profits and gains of business or profession":-
> (a) in the case of any assessee-
> (i) …….
> (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 during the previous year, or in the subsequent year before the expiry of the time prescribed under sub-section(1)of section 200."
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> …… ……. …… ……
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> **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:
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> …… ……. …… ……
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> **194-C. Payments to contractors**.—(1) Any person responsible for paying any sum to any resident (hereafter 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 a 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 an amount equal to—
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> …… ……. …… ……
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> **200. Duty of person deducting tax**.—(1) Any person deducting any sum in accordance with the foregoing provisions of this chapter] shall pay within the prescribed time, the sum so deducted to the credit of the Central Government or as the Board directs.
> (2) Any person being an employer, referred to in sub-section (1-A) of Section 192 shall pay, within the prescribed time, the tax to the credit of the Central Government or as the Board directs.
> (3) Any person deducting any sum on or after the 1st day of April, 2005 in accordance with the foregoing provisions of this chapter or, as the case may be, any person being an employer referred to in sub-section (1-A) of Section 192 shall, after paying the tax deducted to the credit of the Central Government within the prescribed time, prepare such statements for such period as may be prescribed] and deliver or cause to be delivered to the prescribed income tax authority or the person authorised by such authority such statement in such form and verified in such manner and setting forth such particulars and within such time as may be prescribed."

It is also necessary to refer to Rule 30(2) of the Income Tax Rules which stipulates the time prescribed for payment of the tax deducted to the credit of the Central Government as required by

Section 200(1). Rule 30(2), in so far as it is relevant, reads as under:-

> **"Time and mode of payment to Government account of tax deducted at source or tax paid under sub-section (1A) of section 192.**
>
> 30(1) All sums deducted in accordance with the provisions of Chapter XVII-B by an office of the Government shall be paid to the credit of the Central Government-
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> …….. …….. …….. ……..
>
> (2) All sums deducted in accordance with the provisions of Chapter XVII-B by deductors other than an office of the Government shall be paid to the credit of the Central Government-
>
> (a) on or before 30th day of April where the income or amount is credited or paid in the month of March; and
>
> (b) in any other case, on or before seven days from the end of the month in which-
>
> (i) the deduction is made; or
>
> (ii) income-tax is due under sub-section(1A) of section 192."

11. The liability to deduct tax at source under the provisions of Chapter XVII is mandatory. A person responsible for paying any sum is also liable to deposit the amount in the Government account. All the sections in Chapter XVII-B require a person to deduct the tax at source at the rates specified therein. The requirement in each of the sections is preceded by the word "shall". The provisions are, therefore, mandatory. There is nothing in any of the sections that would warrant our reading the word "shall" as "may". The point of time at which the deduction is to be made also establishes that the provisions are mandatory. For instance, under Section 194C, a person responsible for paying the sum is required to deduct the tax "at the time of credit of such sum to the account of the contractor or at the time of the payment thereof. ……". That the legislature has granted an assessee a relaxation from the rigours of Section 40(a)(ia) does not detract from the mandatory nature of the liability to deduct the tax at

source under the various provisions of Chapter XVII-B. Our view is supported by the judgments of the Calcutta and Madras High Courts.

12. A Division Bench of the Calcutta High Court in *Commissioner of Income Tax vs. Crescent Export Syndicate, (2013) 216 Taxman 258 (Calcutta)* held:-

> "13. …… …… …… …… …… ……..
>
> 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."

13. Ms. Dhugga invited our attention to a judgment of the Division Bench of Madras High Court in *Tube Investments of India Ltd. and another vs. Assistant Commissioner of Income-Tax (TDS) and others, [2010] 325 ITR 610 (Mad).* The Division Bench referred to the statistics placed before it by the Department which disclosed that TDS collection had augmented the revenue. The gross collection of advance tax, surcharge, etc. was Rs.2,75,857.70 crores in the financial year 2008-09 of which the TDS component alone constituted Rs.1,30,470.80 crores. The Division Bench observed that introduction of Section 40(a)(ia) had achieved the objective of augmenting the TDS to a substantial extent. The Division Bench also observed that when the provisions and procedures relating to TDS are scrupulously applied, it also ensured the identification of the payees thereby confirming the network of assessees and that once the assessees are identified it would enable the tax

collection machinery to bring within its fold all such persons who are liable to come within the network of tax payers. These objects also indicate the legislative intent that the requirement of deducting tax at source is mandatory.

14. The liability to deduct tax at source is, therefore, mandatory.

15. This brings us to a consideration of the ambit of Section 40(a)(ia). The words “payable” and “paid” have different connotations. The word “paid” is, in fact, an antonym of the word “payable”. This, however, is not significant to the interpretation of Section 40(a)(ia).

16. It is necessary to first deal with the contention on behalf of the appellant that section 40(a)(ia) relates only to assessees who follow the mercantile system and does not pertain to the assessees who follow the cash system.

17. There is nothing that persuades us to accept this submission. The purpose of the section is to ensure the recovery of tax. We see no indication in the section that this object was confined to the recovery of tax from a particular type of assessee or assessees following a particular accounting practice. As far as this provision is concerned, it appears to make no difference to the Government as to the accounting system followed by the assessees. The Government is interested in the recovery of taxes. If for some reason, the Government was interested in ensuring the recovery of taxes only from assessees following the mercantile system, we would have expected the provision to so stipulate clearly, if not expressly. It is not suggested that assessees

following the cash system are not liable to deduct tax at source. It is not suggested that the provisions of Chapter XVII-B do not apply to assessees following the cash system. There is nothing in Chapter XVII-B either that suggests otherwise.

18. Our view is fortified by the Explanatory Note to Finance Bill (No.2) of 2004. Sub-clause (ia) of clause (a) of Section 40 was introduced by the Finance Bill (No.2) of 2004 with effect from 01.04.2005. The Explanatory Note to Finance Bill-2004 stated:-

> "..... ....
>
> With a view to augment compliance of TDS provisions, it is proposed to extend the provisions of section 40(a)(i) to payments of interest, commission or brokerage, fees for professional services or fees for technical services to residents, and payments to a resident contractor or sub-contractor 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 provisions of Chapter XVII-B. ....."

19. The adherence to the provisions ensures not merely the collection of tax but also enables the authorities to bring within their fold all such persons who are liable to come within the network of tax payers. The intention was to ensure the collection of tax irrespective of the system of accounting followed by the assessees. We do not see how this dual purpose of augmenting the compliance of Chapter XVII and bringing within the Department's fold tax payers is served by confining the provisions of Section 40(a)(ia) to assessees who follow the mercantile system. Nor do we find anything that indicates that for some reason the legislature intended achieving these objectives only by confining the operation of Section 40(a)(ia) to assessees who follow the mercantile system.

20. The same view was taken by a Division Bench of the Calcutta High Court in *Commissioner of Income Tax vs. Crescent Export Syndicate, (supra).* It was held:-

> "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."

21. Section 40(a)(ia), therefore, applies not merely to assessees following the mercantile system but also to assessees following the cash system.

If this view is correct and indeed we must proceed on the footing that it is, it goes a long way in indicating the fallacy in the appellant's main contention, namely, if the payments have already been made by the assessee to the payee/contracting party, the provisions of Section 40(a)(ia) would not be attracted even if the tax is not deducted and/or paid over to the Government account.

22. Section 40(a)(ia) refers to the nature of the default and the consequence of the default. The default is a failure to deduct the tax at source under Chapter XVII-B or after deduction the failure to pay over the same to the Government account. The term "payable" only indicates the type or nature of the payments by

the assessees to the persons/payees referred to in Section 40(a)(ia), such as, contractors. It is not in respect of every payment to a payee referred to in Chapter XVII-B that an assessee is bound to deduct tax. There may be payments to persons referred to in Chapter XVII-B, which do not attract the provisions of Chapter XVII-B. The consequences under Section 40(a)(ia) would only operate on account of failure to deduct tax where the tax is liable to be deducted under the provisions of the Act and in particular Chapter XVII-B thereof. It is in that sense that the term "payable" has been used. The term "payable" is descriptive of the payments which attract the liability to deduct tax at source. It does not categorize defaults on the basis of when the payments are made to the payees of such amounts which attract the liability to deduct tax at source.

23. Further, the mere incurring of a liability does not require an assessee to deduct the tax at source even if such payments, if made, would require an assessee to deduct the tax at source. The liability to deduct tax at source under Chapter XVII-B arises only upon payments being made or where so specified under the sections in Chapter XVII, the amount is credited to the account of the payee. In other words, the liability to deduct tax at source arises not on account of the assessee being liable to the payee but only upon the liability being discharged in the case of an assessee following the cash system and upon credit being given by an assessee following the mercantile system. This is clear from every section in Chapter XVII.

24. Take for instance, the case of an assessee, who follows the cash system of accounting and where the assessee who though

liable to pay the contractor, fails to do so for any reason. The assessee is not then liable to deduct tax at source. Take also the case of an assessee, who follows the mercantile system. Such an assessee may have incurred the liability to pay amounts to a party. Such an assessee is also not bound to deduct tax at source unless he credits such sums to the account of the party/payee, such as, a contractor. This is clear from Section 194C set out earlier. The liability to deduct tax at source, in the case of an assessee following the cash system, arises only when the payment is made and in the case of an assessee following the mercantile system, when he credits such sum to the account of the party entitled to receive the payment.

25. The government has nothing to do with the dispute between the assessee and the payee such as a contractor. The provisions of the Act including Section 40 and the provisions of Chapter XVII do not entitle the tax authorities to adjudicate the liability of an assessee to make payment to the payee/other contracting party. The appellant's submission, if accepted, would require an adjudication by the tax authorities as to the liability of the assessee to make payment. They would then be required to investigate all the records of an assessee to ascertain its liability to third parties. This could in many cases be an extremely complicated task especially in the absence of the third party. The third party may not press the claim. The parties may settle the dispute, if any. This is an exercise not even remotely required or even contemplated by the section.

Once this is realized, the fallacy in the contention on behalf of the appellant becomes even more apparent.

26. As we have just noted, Section 40(a)(ia) also applies to assessees following the cash system and the liability of such assessees to deduct tax at source is only upon payment being made to the payee. If the appellant's contention is accepted, once payment is made, the question of the amount being payable to the payee would not even arise. In that event, an assessee following the cash system would never be met with the consequences of Section 40(a)(ia) even if he fails to comply with his obligation to deduct tax at source. If the appellant's submission is accepted, there would be no connection or correlation between two ingredients in the opening part of sub-clause (ia) itself *viz*. the reference in the opening part to any amounts payable to a party on the one hand and the concluding words "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 the other. It is clear, therefore, that the use of the term "payable" in Section 40(a)(ia) is only descriptive of the type or nature of payments by the assessee to the payees referred to in Section 40(a)(ia).

27. The error in the submission on behalf of the appellant is in reading the term "payable" in isolation. The entire provision must be read as a whole.

28. In support of his submission that disallowances contemplated under Section 40(a)(ia) are to be restricted to the amounts payable, to wit, the amounts still to be paid to the contracting party Mr. Sood relied upon the first proviso.

The first proviso, as it stood at the relevant time, was amended by the Finance Act, 2010 with effect from Ist April, 2010. We are, however, concerned with the first proviso prior to its

substitution for this case relates to the assessment year 2005-06. Prior to its substitution, the proviso substituted by the Finance Act, 2008 with retrospective effect from 1st April, 2005, read as under:-

> "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."

According to Mr. Sood, the first proviso can be meaningfully applied only where the amounts are outstanding/payable by the assessee to the payee, as the assessee, who is in possession of the funds of the payee, would be in a position to deduct the amount at source while making the payment to the payee. However, in case the assessee had already made payment to the payee and nothing is outstanding/payable to the payee, it would be impossible for the assessee, who is no more in possession of the funds, to effect the deduction at source with respect to such amounts which had already been paid. Thus, according to him, if the term "payable" is construed as including amounts which had already been paid, the first proviso would be rendered otiose.

29. The submission is not well founded. The proviso alleviated to a great extent the burden on the tax payer who had defaulted in deducting the tax at source. The proviso contemplates a situation where there was a failure to deduct tax at source. As we mentioned earlier, the liability to deduct tax at source would arise in the case of an assessee following the cash system only

upon payment of the amount to the payee/contracting party and in the case of an assessee following the mercantile system, upon the assessee crediting such sum to the account of the payee. Merely because an assessee has not deducted the tax at the relevant time, it does not follow that the assessee cannot thereafter deduct the same. If, for instance, an assessee recovers the amount from the payee subsequently, it would still constitute a deduction from the amount payable to the payee. It would only constitute a subsequent deduction. But, a deduction it still is. The verb "deduct" means to take away and the noun "deduction" is the act or process of deducting. If the tax has been deducted at source when it ought to have been, it would have constituted taking away a part of the money due to the payee. By recovering the amount from the payee subsequently, it would still amount to an act or process of deducting from the amount originally payable. That the same is done after the amount is paid or credited would make no difference. There would be a reduction in the amount paid nevertheless. The proviso is, therefore, not inconsistent with the view that we have taken.

30. Mr. Sood's reliance upon Section 24(b) is of no assistance. The interpretation of Section 24(b) cannot govern the interpretation of Section 40(a)(ia). Section 24(b) reads as under:-

> "24. Income chargeable under the head "Income from house property" shall be computed after making the following deductions, namely:-
>
> (a) ....
>
> (b) where the property has been acquired, constructed, repaired, renewed or reconstructed with borrowed capital, the amount of any interest payable on such capital."

The term “payable” in Section 24(b) is used in an entirely different manner and context and for an entirely different purpose. Here the benefit is accorded on the amount being payable and not only upon the amount being paid. In Section 40, the term “payable” is used to denote the nature of the default and the consequence thereof.

31. Our view is supported by the judgments of the Calcutta and Gujarat High Courts.

The Division Bench of the Calcutta High Court in *Commissioner of Income Tax vs. Crescent Export Syndicate, (supra)* held:-

> “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.
>
> ….. …… …… …..
>
> 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.

….. …… …… …..

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.

….. …… …… …..

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.

….. …… …… …..

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."

We are in respectful agreement with the conclusion and the reasoning of the Division Bench of the Calcutta High Court.

32. A Division Bench of the Gujarat High Court dealt with this issue in *Commissioner of Income Tax vs. Sikandar Khan N. Tunwar and others, (2014) 220 TAXMAN 256 (Gujarat) = (2013) 357 ITR 312 (Guj)*. The Division Bench accepted the contention that the section must be construed strictly; that if the language of the section is plain, it must be given its true meaning irrespective of the consequence and that liability cannot be fastened if the plain meaning of the section does not so permit. The Division Bench also held that the words "payable" and "paid" are not synonymous. After

discussing the difference between the words, the Division Bench held:-

> "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 no-where 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.
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> ….. …… …… …..
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> 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."

We are in respectful agreement with the conclusion and the reasoning of this judgment as well.

33. On behalf of the appellant, reliance was placed on a judgment of a Division Bench of the Allahabad High Court in *Commissioner of Income Tax vs. M/s Vector Shipping Services (P) Ltd., (2013)262 CTR(All)545.* The Division Bench noted the finding of the CIT (Appeals) to the effect that since it had not been disputed that no amount remained payable at the year end, addition could not be made in view of the Special Bench decision of the Tribunal in the case of *Merilyn Shipping & Transports, 136 ITD 23*

(SB) (Vishakhapatnam). The Division Bench also noted the finding of the CIT (Appeals) that when expenses incurred by the appellant were totally paid and did not remain payable at the end of the relevant accounting period, the provisions of Section 40(a)(ia) are not applicable. In paragraph-9, the Division Bench held as follows:-

> "9. It is to be noted that for disallowing expenses from business and profession on the ground that TDS has not been deducted, the amount should be payable and not which has been paid by the end of the year. We do not find that the Tribunal has committed any error in recording the finding on the facts, which were not controverted by the department and thus the question of law as framed does not arise for consideration in the appeal."

34. We are with respect unable to agree with the view taken by the Division Bench of the Allahabad High Court. We do not have the benefit of any reasoning for the finding.

It is true that the Supreme Court by an order dated 02.07.2014, dismissed the department's petition for special leave to appeal. The SLP was, however, dismissed in *limine*. The dismissal of the SLP, therefore, does not confirm the view of the Allahabad High Court. As held by the Supreme Court in *V.M. Salgaocar & Bros. (P) Ltd., etc. Vs. Commissioner of Income Tax, etc. (2000) 243 ITR 383 (SC)* and in *Supreme Court Employees Welfare Association vs. Union of India (1989) 4 SCC 187*, when an SLP is summarily dismissed under Article 136 of the Constitution, the Court does not lay down any law and that the dismissal of an SLP in *limine* by a non speaking order does not justify any inference that the contentions raised on the merits of the case have been rejected and that all that the Supreme Court can be held in such a case to have decided is that it was not a fit case where special leave should be granted. When a special leave petition is dismissed, the Supreme

Court does not comment on the correctness or otherwise of the order from which leave to appeal is sought. In such a case, what the Court means is that it does not consider it to be a fit case for exercise of its jurisdiction under Article 136 of the Constitution. Accordingly, when an SLP is dismissed in *limine* without giving any reasons, it cannot be said that there has been a declaration of the law by the Supreme Court.

35. Mr. Sood relied upon a judgment of a Division Bench of the Delhi High Court dated 18.11.2014 in *The Commissioner of Income Tax-II vs. JDS Apparels Private Limited, Income Tax Appeal No.608/2014*. The Division Bench did not deal with the issue before us. Mr. Sood relied upon the observations in paragraph-17 to the effect that Section 40(a)(ia) should not have been invoked on the principle of doubtful penalization.

36. We are not dealing here with the question of penalty. We have been called upon to interpret the provisions of Section 40(a)(ia).

37. Mr. Sood also relied upon the judgment of a Division Bench of this Court dated 20.11.2014 in the case of *The Commissioner of Income-tax, Hisar vs. M/s Rajinder Parshad Jain, ITA No.228 of 2014*. The revenue sought to raise the following question of law:-

> "ii) Whether on the facts and in the circumstances of the case, the Hon'ble ITAT was right in law in accepting the interpretation adopted by Vishakhapatnam Special Bench of ITAT in case of ACIT Vs Merilyn Shipping & Transporters {136 ITD 23 (SB) (Vishakhapatnam)} that the disallowance u/s 40(a)(ia) is to be made only in respect of payments which are outstanding at the end of financial year and payment of which is without deduction of tax (after end of Financial Year)."

The Division Bench held as under:-

> "As regards the question relating to deduction of tax at source, suffice it to state that the Tribunal has merely restored

the matter to the assessing officer by asking him to verify the transactions and if found to be correct, pass orders accordingly by holding as follows: -

> "8. On perusal of the record we find that the issue in this appeal is in relation to the disallowance made out of payments of labour charges paid for non deduction of tax at source under the provisions of section 194C of the Act. The said disallowance was made by invoking the provisions of section 40(a)(ia) of the Act. The Special Bench of Vishakhapatnam reported in ACIT Vs. Merilyn Shipping & Transports [136 ITD 23 (SB) (Vishakhapatnam)] had laid down the principle that where the amounts have been paid during the year under consideration itself and nothing is payable at the close of the year, no disallowance was warranted under section 40(a)(ia) of the Act for non deduction of tax at source out of such amount paid during the year. Following the above said parity of reasoning, we direct the Assessing Officer to verify the stand of the assessee and in case the said amounts have been paid by the assessee during the year under consideration, no disallowance is warranted out of said payments in line with the provisions of section 40(a)(ia) of the Act. Reasonable opportunity of hearing shall be afforded to the assessee by the Assessing Officer for adjudicating the issue. The ground of appeal raised by the assessee is allowed for statistical purposes."

We find no reason whether in fact or in law to interfere with the above finding as the Tribunal has left it on the assessing officer to determine whether payments were made by the assessee during the year under consideration."

It is clear to us that the Division Bench did not decide the issue as the Tribunal had left it to the Assessing Officer to determine whether the payments were made by the assessee during the year under consideration. The Division Bench did not consider it necessary to interfere as the matter had been remanded by the Tribunal to the Assessing Officer. It would have been open to the authorities to raise all contentions once again after the decision of the Assessing Officer including on the question of the ambit of Section 40(a)(ia). The Division Bench obviously did not interfere with the order of remand for, in the event of the Assessing Officer having found that the payments had not been made, it would not have been necessary to go into the question at all. It is for this

reason that the Division Bench did not even refer to the provisions of Section 40(a)(ia) leave alone construe it.

38. In the circumstances, the question of law is answered against the assessee and in favour of the revenue.

39. The appeals are, therefore, dismissed. There shall, however, be no order as to costs.

(S.J. VAZIFDAR)
ACTING CHIEF JUSTICE

29.04.2015
parkash*

(G.S. SANDHAWALIA)
JUDGE

Whether reportable: **YES/~~NO~~** √