IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN

Before Shri N.R.S. Ganesan (JM) and Shri Chandra Poojari (AM)

I.T.A No. 361/Coch/2012
(Assessment year 2009-10)

The Ramanthali Service Co-operative Bank Ltd, Ramanthali, Payyannur 670 364 PAN : AAAJR0310C	vs	ITO, Wd.4 Kannur
(Appellant)		(Respondent)

Appellant by	:	Shri Arun Raj S
Respondent by	:	Shri K.K. John
Date of hearing	:	20-11-2014
Date of pronouncement	:	21-11-2014

O R D E R

Per N.R.S. Ganesan (JM)

This appeal of the assessee is directed against the order of the CIT(A)-II, Kozhikode dated 21-09-2012 and pertains to assessment year 2009-10.

2. The first issue arises for consideration is deduction u/s 80P of the Act.

3. We heard Shri Arun Raj S, the ld.counsel for the assessee and Shri K.K. John, the ld.DR.

4. It is not in dispute that the assessee has not filed any return of income within the time allowed either u/s 139(1) or 139(4) or within the time allowed by the assessing officer u/s 142(1) of the Act. This Tribunal, in the case of M/s Kadachira Service Co-operative Bank Ltd & Ors vs ITO (2013) 153 TTJ (Cochin) 129 after considering the provisions of section 80A(5) and the judgment of the Apex Court in Prakash Nath Khanna & Another vs CIT (2004) 266 ITR 1 (SC) found that the assessee is not eligible for exemption u/s 80P unless return is filed either u/s 139(1) or 139(4) or within the time provided by the assessee in the notice issued u/s 142(1) of the Act or u/s 148 of the Act and a claim was made for deduction u/s 80P of the Act. In view of the above, , this Tribunal do not find any infirmity in the order of the lower authority.

5. The next ground of appeal is with regard to disallowance on account of payment of interest amount to Rs.10,24,015 u/s 40(a)(ia) of the Act.

6. Shri Arun Raj S, the ld.counsel for the assessee submitted that interest was paid to the respective depositors without deducting tax. Therefore, in view of the decision of the Special Bench of this Tribunal in

Merilyn Shipping & Transports 136 ITD 23 (Vizag) disallowance can be made only in respect of the amount outstanding as at the end of the accounting year only.

7. On the contrary, Shri K.K. John, the ld.DR submitted that admittedly, the assessee paid interest to its members and tax was not deducted. The assessee now claims that since the amount has already been paid, provisions of section 40(a)(ia) is not applicable. The ld.DR placed his reliance on the decision of this Tribunal in ITA Nos 63 & 64/Coch/2014 & Ors in Shri Thomas George Muthoot & Ors order dated 28-08-2014, copy of which is filed and submitted that this Tribunal, by relying upon the judgment of the Calcutta High Court in Crescent Exports Syndicate & Another in ITA 20 of 2013 and GA 190 of 2013 judgment dated 03-04-2013 and the Judgment of the Gujarat High Court in CIT vs Sikandarkhan N Tunwar ITA Nos 905 of 2012, 709 & 710 of 2012, 333 of 2013, 832 of 2012, 857 of 2012, 894 of 2012, 928 of 2012, 12 of 2013, 51 of 2013, 58 of 2013 and 218 of 2013 judgment dated 02-05-2013 found that the Gujarat and Calcutta High Court discussed the matter elaborately whereas the Allahabad High Court has made a passing reference without much discussion. Therefore, this Tribunal found that the judgment which discussed the point in issue elaborately and gave elaborate reasons has to be preferred over the decision which has hardly given any reason for the

decision. Accordingly, this Tribunal followed the judgment of the Calcutta High Court in Crescent Exports Syndicate & Another (supra) and the Gujarat High Court in Sikandarkhan N Tunwar (supra) and confirmed the disallowance made by the lower authorities.

8. We have considered the rival submissions on either side and also perused the material available on record. Admittedly, the interest was paid by the assessee to the depositors. It is also an admitted fact that tax was not deducted tax as required at the time of making the payment of interest.

10. The contention of the assessee is that since the interest was already paid, provisions of section 40(a)(ia) is not applicable. The contention of the assessee is that provisions of section 40(a)(ia) is applicable only in respect of the amounts remains to be paid as on the last day of the financial year. This Tribunal is unable to uphold the contention of the assessee. This Tribunal had an occasion to examine an identical set of facts in Shri Thomas George Muthoot & Ors (supra). This Tribunal, after a detailed discussion, decided the issue in the following manner:

> "6. Now coming to the contention of the assessee that the recipient firm has already paid the tax, this Tribunal finds no merit in such contention. The Apex Court, in Hindustan Coco

Cola Beverages (P) Ltd (supra), after referring to the circular issued by the CBDT in circular No.275/201/95-IT(B) dated 29-01-1997 found that when the deductee-assessee paid the tax, no demand visualized u/s 201(1) of the Act shall be enforced against the defaulter-assessee. In the case before us, the disallowance was made u/s 40(a)(ia) of the Act. The object of section 40(a)(ia) is to compel the assessee to deduct tax at source. In other words, as a precondition for claiming the expenditure otherwise allowable, the assessee has to deduct tax as required under the relevant provisions of the Act. On the contrary, the object of section 201 is only to compensate the government for failure of the assessee to deduct tax at source. Section 201 enables the government to recover the tax from the assessee who defaults in making the deduction at the time of payment. Therefore, the provisions of section 40(a)(ia) and 201 operate in two different fields. Section 40(a)(ia) will not override the provisions of section 201 of the Income-tax Act. Therefore, this Tribunal is of the considered opinion that the judgment of the Apex Court in Hindustan Coco Cola Beverages (P) Ltd (supra) rendered in the context of section 201 may not be applicable in the context of application of section 40(a)(ia) of the Act.

7. We have carefully gone through the provisions of section 40(a)(ia) of the Act. The Parliament by Finance Act, 2012 incorporated second proviso to section 40(a)(ia) of the Act with effect from 01-04-2013. For the purpose of convenience, we are reproducing second proviso as it is inserted by Finance Act, 2012 below:

*"**Provided further** that where an assessee fails to deduct the whole or any part of the tax in accordance with the provisions of Chapter XVII-B on any such sum but is not deemed to be an assessee in default under the first proviso to sub-section (1) of section 201, then, for the purpose of this sub-clause, it shall be deemed that the assessee has deducted and paid the tax on such sum on the date of furnishing of return of income by the resident payee referred to in the said proviso."*

8. In view of this second proviso which came to be inserted in the statute book with effect from 01-04-2013, wherever the assessee fails to deduct tax on any sum, but is not deemed to be an assessee in default u/s 201(1) then, it shall be deemed that the assessee has deducted and paid tax on the said sum on the date of furnishing of the return of income.

9. The next question arises for consideration is whether the second proviso to section 40(a)(ia) as incorporated by Finance Act, 2012 is retrospective in operation or prospective in operation. We are conscious that some of the benches of this Tribunal in the country has taken the view that the second proviso to section 40(a)(ia) is retrospective in operation, therefore, applicable to earlier period also. However, the jurisdictional High Court in the case of Prudential Logistics & Transports in ITA No. 01 of 2014 judgment dated 13th January, 2014, copy of which has been filed by the ld.DR, found that the second proviso is not applicable for earlier

assessment years. In fact, the Kerala High Court has observed as follows:

"5. Reading of Section 40a(ia) along with 2nd proviso and Section 201(1) along with proviso, it would mean that the mandate or requirement on the part of the payer to deduct tax at source is not so strict if they are able to show that the payee or the recipient of the amounts has paid tax in accordance with the provisions of Section 201(1) and the proviso.

6. This was not the claim made by the assessee before the Assessing Officer. The claim was on a different stand, initially reflecting the amounts as loan in the account books though shown as freight charges in the returns and later explained that it was not the loan amount but freight charges. It was never the case of the assessee that there was no mandate subsequent to amendment, to deduct tax as TDS in the light of above provisions. The assessment year in question is 2007-08 and the amendment giving breathing space to payer of amounts is with effect from 01/04/2013. Therefore, the said benefit is not applicable to the assessee. Even otherwise, on factual situation, the very fact that these amounts were claimed as loan initially, till the scrutiny came up for consideration before assessing authority would only indicate the real intention of the assessee firm i.e not to disclose this amount as freight charges but something else as repayment of loan."

10. In view of the above judgment of the jurisdictional High Court, it is binding on this Tribunal that second proviso which was introduced by Finance Act, 2012 is not applicable for the assessment years under consideration. Hence, the CIT(A) has rightly confirmed the addition made by the assessing officer.

11. The next contention of the assessee is that the assessee has already paid the amount, provisions of section 40(a)(ia) is applicable only in respect of the amount which remains to be payable on the last day of the financial year. The ld.representative placed his reliance on the decision of the Special Bench of this Tribunal in Merilyn Shipping & Transports vs AddlCIT (2012) 70 DTR 81 and also the judgment of the Allahabad High Court in CIT vs M/s Vector Shipping Services (P) Ltd I.T.A No.122 of 2013 judgment dated 09-07-2013 and submitted that the SLP filed by the revenue in the Apex Court against the judgment of the Allahabad High Court in M/s Vector Shipping Services (P) Ltd (supra) is dismissed by the Apex Court. It is well settled principles of law that the law laid down by the Apex Court is binding on all courts and authorities including this Tribunal under Article 141 of the Constitution of India. It is also equally settled principle that a dismissal of SLP without any discussion is not the law declared by the Apex Court. The Apex Court thought it fit that it was not a fit case to be admitted for consideration. Therefore, while dismissing the SLP, the Apex Court did not declare any law. Hence, we cannot say that the Apex Court has declared the law declaring that section

40(a)(ia) is applicable only in respect of the amounts remains to be payable at the last day of the financial year.

12. We have also carefully gone through the judgment of the Allahabad High Court in CIT vs M/s Vector Shipping Services (P) Ltd (supra), copy of which is filed by the assessee. The Allahabad High Court, after reproducing the relevant paragraph from the order of CIT(A) and referring to the decision of the Special Bench of this Tribunal in Merilyin Shipping & Transports (supra) found that the Tribunal has not committed an error. It is obvious that there is no discussion about the correctness or otherwise of the decision rendered by the Special Bench of this Tribunal in Merilyn Shipping & Transports (supra). However, we find that the Gujarat High Court in the case of CIT vs Sikandarkhan N Tunvar ITA Nos 905 of 2012, 709 & 710 of 2012, 333 of 2013, 832 of 2012, 857 of 2012, 894 of 2012, 928 of 2012, 12 of 2013, 51 of 2013, 58 of 2013 and 218 of 2013 judgment dated 02-05-2013 considered the decision of the Special Bench of this Tribunal in Merilyn Shipping & Transports (supra) and specifically disagreed with the principles laid down by the Special of this Tribunal in Merilyn Shipping & Transports (supra). The Calcutta High Court also in the case of Crescent Exports Syndicate & Another in ITAT 20 of 2013 and GA 190 of 2013 judgment dated 03-04-2013 considered elaborately the judgment of the Special Bench of this Tribunal in Merilyn Shipping & Transports (supra) and found that the decision rendered by the Special Bench of this Tribunal is not the correct law. It is well settled principles of law that when

different High Courts expressed different opinions on a point of law, then, normally, the benefit of doubt under the taxation law would go to the assessee. It is also equally settled principles of law that the judgment which discusses the point in issue elaborately and gives an elaborate reasoning has to be preferred when compared to the judgment which has no reasoning and discussion. Admittedly, the Calcutta High Court and Gujarat High Court have discussed the issue elaborately and the specific reasoning has also been recorded as to why the Special Bench is not correct. Therefore, this Tribunal is of the considered opinion that the judgments of the Calcutta High Court Crescent Exports Syndicate & Another (supra) and Gujarat High Court in Sikandarkhan N Tunvar (supra) have to be preferred when compared to the Allahabad High Court in M/s Vector Shipping Services (P) Ltd (supra).

13. For the purpose of convenience we reproducing below the observations made by the Calcutta High Court in Crescent Exports Syndicate & Another (supra) and Gujarat High Court in Sikandarkhan N Tunvar (supra):

<u>Calcutta High Court in Crescent Exports Syndicate & Another (supra)</u>

" 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(11) 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, t his 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 rate 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 n 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 of 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 "mounts credited or paid" were used only in relation to a contractor of sub-contractor. This differential treatment was not intended. Therefore, the legislature provided that the amounts, on which tax is deductible at source under 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 of sub-contractor shall not be deducted in com putting the income of an assessee in case he has not deducted, 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 Mr. 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."

Gujarat High Court in Sikandarkhan N Tunvar(supra)

"23. Despite this narrow interpretation of section 40(a)(ia), the question still survives if the Tribunal in case of ***M/s Merilyn Shipping & Transpors 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 the 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 sub-contractor being resident for carrying out any work.

(b) These amounts are such on which tax is deductible at source under XVIII-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 s advanced by the assessees is accepted, it would lead to a situation where the assessee 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 tht we would not readily accept that the legislature desired to bring about an incongruous and seemingly irreconcilable consequences. The decision of he Supreme Court in the case of ***Commissioner of Income-Tax, Gujarat vs. Ashokbhai Chimanbhai*** *(supra), would no6t 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 f 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 31t 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 to 36……..

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 provisions is amply clear.

38. In the result, w are of the opinion that Section 40(a)(ia) would cover not only to the amounts which are payable as on 31st March of a particular year but also which are payable at any time during the year. Of course, as long as the other requirement 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."*

14. By following the judgments of the Calcutta High Court in Crescent Export Syndicate (supra) and the Gujarat High Court in Sikandarkhan N Tunvar (supra), this Tribunal is of the considered opinion that the decision of the Special Bench of this Tribunal in the case of M/s Merilyn Shipping & Transports (supra) and the judgment of the Allahabad High Court in Vector Shipping Services (P) Ltd (supra) are not applicable to the facts of the case under consideration whereas the judgments of the Calcutta High Court in Crescent Export Syndicate (supra) and the Gujarat High Court in Sikandarkhan N Tunvar (supra) are squarely applicable to the facts of the case. Respectfully following the judgments of the Calcutta High Court in Crescent Export Syndicate (supra) and the Gujarat High Court in Sikandarkhan N Tunvar (supra), we do not see any infirmity in the orders of the lower authorities. Accordingly, the orders of the lower authorities are confirmed."

11. In view of the above decision of this Tribunal on identical set of facts, this Tribunal do not find any infirmity in the order of the lower authority. Accordingly, the same is upheld.

12s. In the result, the appeal of the assessee is dismissed.

Order pronounced in the open court on this 21st November, 2014.

Sd/-	sd/-
(Chandra Poojari)	(N.R.S. Ganesan)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Cochin, Dt : 21st November, 2014
pk/-

copy to:

1. The appellant
2. The respondent
3. The Commissioner of Income-tax
4. The Commissioner of Income-tax(A)
5. The DR

(True copy) By order

Asstt. Registrar, Income-tax Appellate Tribunal, Cochin Bench