IN THE INCOME TAX APPELLATE TRIBUNAL
Special Bench, Visakhapatnam

Before Shri D. Manmohan, VP(MZ), Shri S.V. Mehrotra, AM &
Shri Mahavir Singh, JM

ITA No. 477/Viz/2008
(Assessment Year: 2005-06)

M/s. Merilyn Shipping & Transports Visakhapatnam PAN – ACGPP 0454 R	Vs.	ACIT, Range – 1 Visakhapatnam
Appellant		**Respondent**

Appellant by: Shri Subramanyam
Respondent by: Shri T.L. Peter &
Smt. D. Komali

Date of Hearing: 16.12.2012
Date of Pronouncement: ~~.03.2012~~

INTERVENERS

Name of assessee	Appeal No.	Represented by
Blue Marine Logistics Pvt. Ltd., Chennai	ITA No. 1550/Chny/ 2010	Sri. B. Ramakrishnan
Rajamahendri Shipping & Oil Field Services Ltd., Rajahmundry	ITA No. 352/Viz/08	Sri G.V.N. Hari
Peddu Srinavasa Rao. Vijayawada	ITA No. 342/Viz/2009	Sri Y. Suryachandra Rao

O R D E R

Per D. Manmohan, V.P.

I have gone through the orders passed by the learned Accountant Member, Shri S.V. Mehrotra as well as the learned Judicial Member, Shri Mahavir Singh. I am not able to persuade myself to agree with the view taken by Shri S.V. Mehrotra, Accountant Member. I have gone through the detailed reasons given by Shri Mahavir Singh while coming to the conclusion

that the word 'payable' used in section 40(a)(ia) of the Income Tax Act, 1961 has to be given its natural meaning and, going by strict interpretation, I am of the firm view that section 40(a)(ia) of the Act is applicable only to expenditure which is payable as on 31st March of every year and cannot be invoked to disallow the amounts which have already been paid during the previous year, without deducting tax at source. I therefore agree with the view taken by Shri Mahavir Singh, JM and answer the question accordingly. The matter may now be placed before the Division Bench for passing appropriate orders, in the above listed cases, in the light of the majority view of the Members consisting of the Special Bench.

Order signed on 29th March 2012.

(D. Manmohan)
Vice President

Dated: 29th March 2012

IN THE INCOME TAX APPELLATE TRIBUNAL : SPECIAL BENCH : VISAKHAPATNAM
[Before Shri D.Manmohan, V.P.(MZ), Shri S.V.Mehrotra, A.M. & Shri Mahavir Singh, J.M.]

I.T.A.No. 477/Viz./2008
Assessment Year 2005-2006

Merilyn Shipping & Transports, Visakhapatnam.	**Vs**	**Additional Commissioner of Income Tax, Range-1, Visakhapatnam.**
[Appellant]		**[Respondent]**

Appellant by : Shri S.Subramanyam, A.R.
Respondent by : S/Shri T.L.Peter & Smt. D. Komali, D.R.

Date of Hearing : 16.12.2011
Date of Pronouncement : .03.2012

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O R D E R

PER SHRI MAHAVIR SINGH, J.M.

I have gone through proposed order of Ld A.M., Brother Shri S.V.Mehrotra and could not persuade myself to the conclusion arrived at by my Brother. So, I am writing my own order on the basis of arguments of both the sides and material placed before us. As regards to arguments narrated by Ld Brother Shri Mehrotra, I have no difference because he has beautifully narrated every argument of both the sides.

First, I have perused the question referred to the Special Bench by Hon'ble President, which is as under:

> *"Whether Sec.40(a)(ia) of the Income Tax Act can be invoked only to disallow expenditure of the nature referred to therein which is shown as "payable" as on the date of the balance sheet or it can be invoked also to disallow such expenditure which beco.ne*

payable at any time during the relevant previous year and was actually paid within the previous year?"

2. Section 40(a)(ia) of the Act was introduced in the Income-tax Act, 1961 by the Finance Act, 2004 w.e.f. 1st April, 2005 with a view to augment the revenue through the mechanism of tax deduction at source. This provision was brought on statute to disallow the claim of even genuine and admissible expenses of the assessee under the head "Income from Business & Profession" in case the assessee does not deduct TDS on such expenses. The default in deduction of TDS would result in disallowance of expenditure on which such TDS was deductible. Let us see the provision as brought out in the Act, which is as under:

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

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

Finance (No.2) Bill, 2004 : (268 ITR(st.) 40-41)	**Finance Act 2004: Actual Enactment**
Amendment of section 40. — In section 40 of the Income-tax Act, in clause (*a*), after sub-clause (*i*), the following shall be inserted with effect from the 1st day of April, 2005, namely:-	"40. ….
(*ia*) any interest, commission or brokerage,	(*ia*) any interest, commission or brokerage,

fees for professional services or fees for technical services payable to a resident, or amount credited or paid to a contractor or sub-contractor, being resident, for carrying out any work (including supply of labour for carrying out any work), on which tax has not been deducted or, after deduction, has not been paid before the expiry of the time prescribed under sub-section (1) of section 200 and in accordance with the other provision of Chapter XVII-B:	rent, royalty, fees for professional services or fees for technical services payable to a resident, or amounts payable to a contractor or sub-contractor, being resident, for carrying out any work (including supply of labour for carrying out any work), on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or, after deduction, has not been paid on or before the due date specified in sub-section (1) of section 139,—
Provided that where in respect of any such sum, tax has been deducted under Chapter XVII-B or paid in any subsequent year, such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid."	**Provided** that where in respect of any such sum, tax has been deducted in any subsequent year, or has been deducted during the previous year but paid after the due date specified in sub-section (1) of section 139, such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid "

From the above comparison between the proposed and enacted provision, I find that the Legislature has replaced the word "amounts credited or paid" with the word "payable" in the final enactment. As argued by ld. Counsel for assessee as well as for the Interveners, a question arises as to why the Legislature dropped the words "credited" and "paid" under section 40(a)(ia) as proposed in the Finance Bill, 2004. The ld. Counsel argued that the word "paid" was not incorporated because Legislature knew it that if amount is already paid, TDS cannot be deducted. According to ld. Counsel, as per Rule 30 of Income Tax Rules, 1962 (hereinafter referred to as 'the Rules'), which, *inter alia*, deals with time and mode of payment of Tax deducted at source, he pointed that Rule 30 of the Rules prior to its substitution by the Income-tax (Sixth Amendment) Rules, 2010 with retrospective effect from 1st April, 2010 allowed two months period of time for depositing of TDS, if the amount is deducted with reference to this Rule. According to the ld. Counsel, the words "paid" and "payable" have different connotations and accordingly, different time periods have been prescribed for depositing of TDS. According to ld. Counsel, the provision of section 43 deals with definition of certain terms relating to income from profits and gains of business or profession and pointed out that sub-section (2) defines the term "paid" as under:

"(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".

According to ld. Counsel, though the word "paid" has been defined but the word "payable" has not been defined in the Act and he referred to the dictionary meaning of the word "payable". ld. Counsel, Shri S. Subramanian in the case of Merilyn Shipping & Transports, Visakhapatnam has filed written submission and at page 6, para 2.2 has given the term "payable" as per the dictionary meaning which is as under:

"2.2. The word' payable' as per dictionary meaning is (a) that must be paid, (b) able to be paid.

(a) Oxford dictionary defines the terms 'payable' and 'paid' as under:-
Payable (pay-a-ble- adjective [predict.]

1. (of money) required to be paid; due :
2. able to be paid :
Noun (payables)
Debts owed by a business' liabilities.

Paid : Past and past principal of PAY.

(b) According to Black's Law Dictionary (Seventh Edition) at p. 1150-, the term 'payable' is defined as a sum of money that is to be paid. Another meaning to the term 'payable' is given as under :-
"An amount may be payable without being due. Debts are commonly payable long before they fall due".

(c) According to West's Legal Thesaurus/ Dictionary Paid : means pay. To discharge a debt.

Payable : means justly or legally due (payable immediately}. Uncollected (outstanding debts). Unpaid, undischarged, unsatisfied, unsettled, mature, owed, ripe, collectable, in arrears, redeemable."

To support this, ld. Counsel for the assessee relied on the decision of the Hon'ble Bombay High Court in the case of Abdul Gaffar A.Nadiadwala v ACIT & Ors. (2004) 267 ITR 488(Bom) wherein held that The Income-tax Act does not define the words 'goods' or merchandised but it well-settled that in the absence of there being anything contrary to the context the language of its statute should be interpreted according to the plain dictionary meaning of the terms used therein.

3. Further, the ld. Counsel relied on the decision of the Hon'ble Supreme Court in the case of Smt. Tarulata Shyam & Ors.v CIT (1977) 108 ITR 345 (SC) wherein it is held that, "it is a fundamental rule of taxation that where there is no scope for importing into the statute words which are not there, such importation would be not to construe, but to amend, the statute. Even if there is any *casus omisus* the defect can be remedied by the legislation alone and not by judicial interpretation. Ld. Counsel also relied on the decision of Hon'ble Supreme Court in the case of CIT v Vegetable Products Ltd. (1973) 88 ITR 192 (SC), wherein it is held that if the court finds that the language of the taxing provision is ambiguous or capable of more meanings than one, then the court has to adopt that interpretation which favours the assessee, more particularly so where the provision relates to imposition of a penalty. Ld. Counsel in this context here argued that the provisions of section 40(a)(ia) of the Act are penal in nature because it disallows even the genuine and admissible claims of expenses under the head "Income from Business & Profession" if the assessee does not deduct TDS on such expense.

4. Further, the ld. Counsel also referred to the decision of the Hon'ble Supreme Court, as regards to cardinal principle of interpretation whereby literal rule of interpretation should be followed, in the case of Raghunath Rai Bareja and Others v Punjab National Bank and Others (135 Company cases 163) wherein it is observed as under:

> *"It is a cardinal principle of interpretation of statute that the words of a statute must be understood in their natural, ordinary or popular sense and construed according to their grammatical meaning, unless such construction leads to some absurdity or unless there is something in the context or in the object of the statute to suggest to the contrary. The golden rule is that the words of a statute must prima facie be given their ordinary meaning. It is yet another rule of construction that when the words of the statute are clear, plain and unambiguous, then the Courts are bound to give effect to that meaning, irrespective of the consequences. It is said that the words themselves best declare the intention of the law-giver. The Courts are adhered to the principle that efforts should be made to give meaning to each and every word used by the legislature and it is not a sound principle of construction to brush aside words in a statute as being inapposite surpluses, if they can have a proper application in circumstances conceivable within the contemplation of the statute".*
>
> *The same view has been taken by this Court in S. Mehta vs. State of Maharashtra 2001 (8) SCC 257 (vide para 34) and Patangrao Kaddam vs. Prithviraj Sajirao Yadav Deshmugh AIR 2001 SC 1121.*

The literal rule of interpretation really means that there should be no interpretation. In other words, we should read the statute as it is, without distorting or twisting its language.

We may mention here that the literal rule of interpretation is not only followed by Judges and lawyers, but it is also followed by the lay man in his ordinary life. To give an illustration, if a person says "this is a pencil", then he means that it is a pencil; and it is not that when he says that the object is a pencil, he means that it is a horse, donkey or an elephant. In other words, the literal rule of interpretation simply means that we mean what we say and we say what we mean. If we do not follow the literal rule of interpretation, social life will become impossible, and we will not understand each other. If we say that a certain object is a book, then we mean it is a book. If we say it is a book, but we mean it is a horse, table or an elephant, then we will not be able to communicate with each other. Life will become impossible. Hence, the meaning of the literal rule of interpretation is simply that we mean what we say and we say what we mean."

The provision of section 40(a)(ia) of the Act clearly uses the term "payable" and not "paid". Hence, if the literal construction of this word is taken, then no word can be substituted in place of the said word "payable" nor can any new word be supplied in the provision. The language of the provision has thrown open two terms "paid" and "payable" for judicial interpretation. We have gone through the meaning of terms "payable" and "paid" as defined in various judicial dictionaries and the definitions are reproduced above in para 3 of this order.

5. In respect to this, Revenue argued that the interpretation of the word "payable", if restricted to payable, will throw up an anomalous situation. As per ld CIT-DR, if the disallowance under section 40(a)(ia) of the Act is restricted to amounts payable then it in the subsequent year such provision is actually paid off without deducting TDS or depositing the same the revenue would lose its right to disallow such expenses. According to ld CIT- DR, this would render the provision of section 40(a)(ia) of the Act otiose and its avowed objective of augmenting revenue through the compliance of TDS provision would fall flat. Another argument taken by ld CIT-DR was that section 40(a)(ia) of the Act would fail where assessee is maintaining books of account on cash system and according to ld CIT-DR, this is because there would be no amount claimed as expenses from outstanding or from payable amount. For this, ld CIT-DR referred that the provision of section 43B of the Act will be of no consequence.

6. No doubt the dispute before us is whether the term "payable" in section 40(a)(ia) of the Act refers to entire payment on which the TDS was required to be made in terms of various provisions referred to in this section contained in chapter XVII-B or it refers only to amount payable with reference to those sections, which, as per the assessee, remain outstanding as on 31st March of every year. The contention that a particular amount is covered under chapter XVII-B and therefore TDS was required to be made from that amount but the amount has also been paid without TDS, therefore, disallowance to this extent should not be made under section 40(a)(ia) of the Act. The provision of section 40(a)(ia) of the Act was introduced in order to ensure compliance of TDS but assigned the term "payable" in the provision of section 40(a)(ia) of the Act. On a comparison between the proposed and enacted provision, the only conclusion, which can be reached, is that Legislature consistently replaced the words "amount credited" or "paid" with the word "payable" in the final enactment and such change was not done without any purpose. It is a basic presumption that an enactment was brought in by the Legislature is well-thought of and properly worded in order to give meaning to its intent by changing the words from "credited" or "paid" to "payable". The legislative intent has been made clear that only the outstanding amount or the provision for expense liable for TDS is sought to be disallowed in the event there is a default of TDS. This proposition is also explained by Hon'ble Supreme Court in the case of CIT V Kelvinator of India Ltd. (2010) 320 ITR 561 (SC), wherein it is held *"Our view gets support from the changes made to section 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words "reason to believe" but also inserted the word "opinion". However, on receipt of representations from the companies against omissio9n of the words "reason to believe", Parliament reintroduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the AO."* And further Hon'ble Supreme Court quoted the relevant portion of circular no.549 dated October 31, 1989 (1990) 182 ITR (St.) 1, 29), which reads as under:

> *"7.2 Amendment made by the Amending Act, 1989, to reintroduce the expression `reason to believe' in section 147.- A number of representations were received against the omission of the words `reason to believe' from section 147 and their*

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

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

7. The Revenue's argument does not have any merit that payment of earlier years outstanding expenses cannot be allowed in subsequent year unless specifically provided in the Statute. Proviso to section 40(a)(ia) of the Act lays down that earlier year's provision can be allowed in subsequent years only if TDS is deducted and deposited. Hence, revenue's fear is unfounded and the provision of section 40(a)(ia) of the Act covers the situation. Another argument of the revenue as regards to maintaining of books of account from cash and no amount claimed as expense being outstanding or payable, when the assessee itself has not claimed expense which is outstanding, there could be no reason to disallow the same. The Income-tax Act already has a precedence in section 43B of the Act which allows expense only on payment basis and therefore, the argument of the revenue, that section 40(a)(ia) of the Act would become otiose in cash system of accounting, was without any basis.

8. I have no dispute about the Rule of interpretation, wherein referred the decision of England in the case of Inland Revenue Commissioner v Hinchy (1960) A.C. 748 at page 767; (1960) 1 All E.R. 505 (512) Lord Reid observed as under:

> *"What we must look for is the intention of Parliament, and I also find it difficult to believe that Parliament ever really intended the consequences which flow from the appellant's contention. But we can only take the intention of Parliament from the words which they have used in the Act."*

Further, it was observed as under:

> *"Moreover, the expression 'intention of the legislature' is ambiguous. Does it connote meaning or purpose; or, putting it in another way, does the present case fall within what the legislature 'meant' by these words, or does it fall within the purpose which they 'meant' to accomplish by the use of these words?*

But in the present case, the only word put in the provision of section 40(a)(ia) of the Act is "payable" and not "paid" or "credited", rather Legislature consciously replaced the word "amounts credited or paid" with the word "payable" in the final enactment and such change was done with a purpose. I am of the view that presumption that enactment brought in by the Legislature is well-thought off and properly worded in order to give meaning to its intent. The Legislature by consciously replacing the words from "credited" or "paid" to "payable", the intent has been made clear that only the outstanding amount or the provision for expenses are liable for TDS are to be disallowed in the event there is default in not following the TDS provisions under chapter XVII-B of the Act. No doubt the object of section 40(a)(ia) of the Act is to ensure that the TDS provision as provided in chapter XVII-B is implemented without any default. As per section 40(a)(ia) of the Act any interest, commission or brokerage, rent, royalty, fees for professional services or fees for technical services "payable" on which tax is not deducted or the tax is deducted but the same is not paid within the time allowed such amount shall be disallowed while computing the income. The sub-section speaks of the amount "payable" on which the tax is not deducted and therefore it should apply only if any amount is "payable", but if the amount is already paid the provisions of this section should not apply. The crucial word is "payable." The question arises "whether payable means payable at the end of the year or payable at any time during the year though paid during the year itself? If one looks into the TDS Provisions from section 194A to 194 K, it will be apparent that as per the

language of those sections, tax is to be deducted at the time the amount is paid or at the time when the amount is credited, i.e. when the liability is admitted and it becomes payable. Therefore wherever the payment is covered by aforesaid sections whether paid or credited, tax has to be deducted. Section 194 L and 194LA may also be looked into which says that tax has to be deducted only at the time of payment. The language in these sections therefore shows that the legislature has used different language in different sections. It is trite law that each and every word of the section has its own meaning and while drafting section 40(a)(ia) of the Act , the legislature was conscious of the fact that there may a case where the amount is paid and there may be a case where the amount is payable and have used appropriate words so that the language may be clear and clear meaning may be given. One may look into the language contained in Finance Bill, 2004 wherein this provision was introduced. In the finance bill both the words paid and payable were used (2004) 268 ITR (Statute) 40. However the word paid was subsequently dropped which shows that 40(a)(ia) was meant to be applicable only if the amounts covered therein was "payable" at the end of the year. Reference may be made, for the scope and effect of section 40(a)(ia) as clarified by CBDT in Circular No. 5 of 2005, date 15th July, 2005 to show that the intention to introduce this provision was brought to curb bogus payments by creating bogus liability.

9. I find that Hon'ble Supreme Court in the case of Vegetable Products Ltd. (*supra*) have interpreted the word payable as the amount "payable" after deducting the amount paid at the time of imposing penalty. Further, the Hon'ble Gujarat High Court in the case of CIT v Upnishad Investment (P) Ltd & Ors (2003) 260 ITR 532 (Guj) may also be referred wherein the word payable has been interpreted by Hon'ble Gujarat High Court as the amount due or outstanding as under:

> *"We are of the view that though the Legislature changed the expression from "receivable" to "due" in section 18 of the 1961 Act (corresponding to section 8 of the 1922 Act), we are unable to find any substantial difference between the expression "receivable" on the one hand and "due" on the other hand. "Receivable" and "payable" are the same things (see Hayward v. James 29 Ch. D 822). The expression "receivable" is used with reference to the recipient and the "adjective, "due" means capable of being justly demanded, payable or owing and unpaid. The expression "due" is defined by "Webster" to mean that which is owed; that which custom, statute or law requires to be paid."*

10. 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. Section 40(a)(ia) of the Act has been enacted for the purposes of augment of tax through the mechanism of TDS and was in furtherance to the said objective. This is a deeming provision. How to interpret the deeming provision or what is the meaning of word "deem". As verb transitive, the word 'deem' means to treat something as if (i) it is really something else, or (ii) it has qualities that it does not have. 'Deem' is a useful word when it is necessary to establish a legal fiction either positively by 'deeming' something to be something it is not or negatively by 'deeming' something not to be something which it is. Legal fiction is an assumption that something is true even though it may be untrue. Such an assumption is especially made in judicially reasoning to alter how a legal rule operates. When the law creates a legal fiction such fiction should be carried to its logical end. There should be no hesitation in giving full effect to it. The proposition that legal fiction must be carried to its logical conclusion does not, however, mean that it should be carried to an illogical length. By catena of decisions, three rules are fairly well settled for interpreting a provision creating a legal fiction. They are as under:

> *(i) The Court is to ascertain the purpose for which the fiction has been created, and after ascertaining this, the Court is to assume all those facts and consequences, which are incidental or inevitable corollaries to giving effect to the fiction.*
>
> *(ii) The legal fiction cannot be interpreted in a manner that extends the effect of fiction beyond the purpose for which it is created or beyond the language of the section by which it is created. Neither can one allow himself to be so carried away by a legal fiction so as to ignore the words of the very section which creates it or its context or setting in the statute which contains that section nor can one loose sight of the purpose for which the fiction is created.*
>
> *(iii) Outside the bounds of the legal fiction the difference between the reality and the fiction may still persist in the provisions of the same Act which creates the fiction and the difference may be ascertained by reference to the subject and context of those provisions.*

It means that legal fiction cannot be extended any further and has to be limited to the area for which it is created. Hon'ble Andhra Pradesh High Court in the case of *Addl. CIT v.*

Durgamma P. (1987) 167 1TR 776 (AP) held that it is not possible to extend the fiction beyond the field legitimately intended by the statute. The Hon'ble court was dealing with the provisions of sec. 171(1) of the IT Act in the context of which it was held that joint family shall be deemed to continue for the limited purpose of assessing cases of joint families which have been hitherto assessed as such. It is not possible to extend that fiction to other cases. Similar view was taken by the Hon'ble Kerla High Court in CIT v. Kar Valves Ltd. (1987) 168 ITR 416 (Ker.) wherein it is held that legal fiction is limited to the purpose for which they are created and could not be extended beyond that legitimate frame, Hon'ble Kerala High Court was dealing with the case where assessee sought to take advantage of sec. 41(2) of the Act by submitting that if liabilities are not liquidated and outstanding are not collected, then business could be deemed to continue. Hon'ble Allahabad High Court in the case of *Controller of estate Duty v. Krishna Kumar Devi* (1988) 173 ITR 561 (All) held that in interpreting the legal fiction the court should ascertain the purpose for which it was created and after doing so assume all facts which are logical to give effect to the fiction. Further, Hon'ble Supreme Court in CIT v Mother India Refrigeration Pvt. Ltd. (1985) 155 ITR 711 (SC) held that legal fictions are created only for some definite purpose and they must be limited to that purpose and should not be extended beyond that legitimate field. In CIT v, Bharani Pictures (1981) 129 ITR 244 (Mad,) it is held that legal fictions are for a definite purpose and are limited to the purpose for which they are created and should not be extended beyond its legitimate field. The statutory fiction introduced in one enactment cannot be incorporated in another enactment. The point that legal fiction cannot be extended to a new field was highlighted by Hon'ble Madras High Court in CIT v Rajam T.S (19SS) 125 ITR 207(Mad,) wherein it is held that section 41(2) of the Act creates a legal fiction under which the balancing charge is treated as business income chargeable to tax but when this amount is distributed to shareholders then it would not become deemed dividend and it would be only a capital receipt and not distribution of accumulated profits. Thus, a legal fiction was invoked in the hands of the assessee company and was not extended in the hands of the shareholders. In the present case, section 40(a)(ia) of the Act creates a legal fiction for the amounts outstanding or remains payable i.e. at the end of every year as on 31st March and it cannot be extended for taxing the amounts already

paid. In fact, section 201 of the Act itself take care of tax to be collected in the hands of the payee and other TDS provisions under chapter XVIIB of the Act. No further legal fiction from elsewhere in the statute can be borrowed to extend the field of section 40(a)(ia) of the Act. This fiction cannot be extended any further and, therefore, cannot be invoked by Assessing Officer to disallow the genuine and reasonable expenditure on the amounts of expenditure already paid.

11. As regards to argument of revenue regarding challenge to the constitution of this provision before Hon'ble Madras High Court in the case of Tube Investments of India v. ACIT (2009) 325 ITR 610 wherein the court rejected the said challenge and upheld the validity of section 40(a)(ia) of the Act and the competence of the Legislature in enacting such a provision on the ground that this provision has been introduced in order to augment tax through the mechanism of TDS and the provisions of section 40(a)(ia) of the Act is in furtherance to the said objective. Further, Hon'ble Allahabad High Court also declared the provisions of section 40(a)(ia) as constitutionally valid in the case of Dey's Medical (U.P.) (P) Ltd. vs. Union of India & Ors. (2009) 316 ITR 445. It is not in doubt that Hon'ble Madras High Court and Hon'ble Allahabad High Court has held the constitutional validity of this provision but it is also true that specific issue regarding "paid", "credited" or "payable" has not been considered and even it was not argued. Hence, these judgments will in no way affect this issue.

12. In view of the above judicial pronouncements of Hon'ble Supreme Court and Hon'ble High Courts, materials placed before us, arguments made by both the sides and in view of the provisions of section 40(a)(ia) of the Act, on comparison between the proposed and enacted provision, the only conclusion which I can reach is that the Legislature consciously replaced the words "amounts credited or paid" with the word "payable" in the final enactment. By changing the words from "credited" or "paid" to "payable", the legislative intent has been made clear that only outstanding amounts or the provisions for expenses liable for TDS under chapter XVII-B of the Act is sought to be disallowed in the event there is a default in following the obligations casted upon the assessee under chapter XVII-B of the Act. I agree with the arguments made by ld.

Counsel for the assessee and other Counsels for the Interveners that while interpreting the word "payable" in this provision, the word of a statute must be understood in its natural, ordinary or popular sense and construed according to its grammatical meaning. According to me, such construction would not lead to absurdity because there is nothing in this context or in the object of this statute to suggest to the contrary. It is a cardinal principle of interpretation that the words of a statute must be prima facie given their ordinary meaning, when the words of the statute are clear, plain and unambiguous then the courts are bound to give effect to that meaning. The literal rule of interpretation really means that there should be no interpretation of the statute, rather in other words, we should read the statute as it is without doing any violence to the language. In the present dispute before us, the word "payable" used in section 40(a)(ia) of the Act is to be assigned strict interpretation, in view of the object of Legislation, which is intended from the replacement of the words in the proposed and enacted provision from the words "amount credited or paid" to "payable". Hence, in my view, my answer to the question referred by Hon'ble President to the Special Bench is as under:

> The provisions of section 40(a)(ia) of the Act are applicable only to the amounts of expenditure which are payable as on the date 31st March of every year and it cannot be invoked to disallow which had been actually paid during the previous year, without deduction of TDS.

Order Signed on 14th March, 2012

(Mahavir Singh)
Judicial Member

Dated: 14-03-2012

IN THE INCOME TAX APPELLATE TRIBUNAL : "SPECIAL" BENCH : Visakhapatnam

[Before Sri D. Manmohan, V.P.(MZ), Sri S.V. Mehrotra, A.M.& Sri Mahavir Singh,J.M.]

आयकर अपील संख्या / I.T.A No. 477/Viz./2008

Assessment Year : 2005-2006

Merilyn Shipping & Transports, Visakhapatnam	-vs.-	Additional Commissioner of Income Tax, Range-1, Visakhapatnam
(अपीलार्थी /Appellant)		(प्रत्यर्थी/Respondent)

For the Appellant (अपीलार्थी) : Shri S. Subramanyam, A.R.

For the Respondent (प्रत्यर्थी) : Shri T.L. Peter & Smt. D. Komali, DR.

सुनवाई की तारीख/Date of Hearing : 16.12.2011

घोषणा की तारीख/Date of Pronouncement : .01.2012

आदेश/ORDER

Per Shri S.V. Mehrotra, Accountant Member/ श्री एस. भी.मेहरोत्रा , लेखा सदस्य :-

This appeal filed by the assessee is against the order of ld. Commissioner of Income-tax (Appeals)-I, Visakhapatnam dated 03.07.2008 for the assessment year 2005-06.

2. When the matter came up before the ld. Members of the Visakhapatnam Bench on 08.03.2010, the assessee relied on the order of Tribunal dated 23.10.2009 of ITAT, Hyderabad 'A' Bench, Hyderabad in the case of M/s. Teja Constructions, Hyderabad in I.T.A. No. 308/Hyd./2009 relating to the assessment year 2005-06. After hearing ld. D.R., the Bench could not agree with the decision rendered by the ITAT Hyderabad 'A' Bench and, therefore, referred the matter to the Hon'ble President to constitute a Special Bench. Hon'ble President constituted the Special Bench to decide the following question:-

> *"Whether Sec. 40(a)(ia) of the Income Tax Act can be invoked only to disallow expenditure of the nature referred to therein which is shown as "payable" as on the date of the balance sheet or it can be invoked also to disallow such expenditure which become payable at any time during the relevant previous year and was actually paid within the previous year?"*

3. Brief facts of the case are that the assessee, a partnership firm, in the relevant assessment year, derived income from business of ship containers transport and handling, customs clearing and as forwarding agents. It filed its return of income for assessment year 2005-06 declaring total income of Rs.15,24,710/- on 29.03.2006. In the course of assessment

proceedings, the Assessing Officer noticed that the assessee had claimed certain expenditure in Profit & Loss A/c., i.e. brokerage expenses of Rs.38,75,000/- and commission Rs.2,43,253/- without deducting TDS on payment of these amounts as required under section 40(a)(ia) of the Income Tax Act. The Assessing Officer intimated the defaults. In response assessee's representative accepted his failure for non-deduction of TDS at the time of making payment and agreed for the disallowance. Accordingly, Assessing Officer disallowed brokerage of Rs.38,75,000/- and commission of Rs.2,43,253/-. Before ld. CIT(Appeals), it was submitted that at the time of assessment, the assessee was under bona fide belief that the provisions of section 40(a)(ia) of the Act were applicable for both the amounts 'paid' as well as 'payable' . However, on careful reading of the said provision and after going through the expert opinion, it was found that the said provisions were applicable for the amounts 'payable' only. It was, thus, submitted that since in the assessee's case the outstanding brokerage and commission as on 31.03.2005 was only Rs.1,78,025/-, disallowance should have been restricted to only Rs.1,78,025/-. Ld. CIT(Appeals) rejected the assessee's contention, inter alia, observing 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 the inevitable conclusion that the said word also includes the 'paid' amount. Hence, the assessee's argument in this regard was not acceptable and the Assessing Officer was correct in disallowing the entire payments claimed towards brokerage and commission. Being aggrieved, the assessee is in appeal before us.

As noted earlier, Hon'ble President has constituted this Special Bench to decide the question noted above in para 2.

Following are the Interveners in the matter Intervener No. 1 - M/s. Blue Marine Logistics Pvt. Ltd., Chennai, for which Shri B. Ramakrishnan, C.,A. appeared, Intervener No. 2 - Rajamahendri Shipping & Oil Field Services Ltd. for which Shri Gun Hari, C.A. appeared, and Intervener No. 3 - Srinivasa Rao for which Shri Y. Suryachandra Rao, C.A. appeared, C.A.

4. Ld. counsel for the assessee, Shri S. Subramanyam submitted that Finance (No. 2) Bill, 2004 sought to amend section 40 of the Income Tax Act by inserting sub-clause in clause (a) w.e.f. 1st April, 2005 as under :-

> *(ia) Any interest, commission or brokerage, fees for professional services or fees for technical services* ***payable*** *to a resident, or amounts* ***credited or paid*** *to a contractor or sub-contractor, being resident, for carrying out*

any work (including supply of labour 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 :

Provided that where in respect of any such sum, tax has been deducted under Chapter XVII-B or paid in any subsequent year, such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid".

4.1. Ld. counsel for the assessee further referred to Notes on Clause 11 of Notes on clauses to Finance (No. 2) Bill, 2004, which reads as under :-

Clause 11 of the Bill seeks to amend section 40 of the Income Tax Act relating to amounts not deductible.

*The proposed amendment seeks to insert a new sub-clause (ia) in clause (a) of the said section so as to provide that any interest, commission or brokerage, fees for professional services or fees for technical services, **payable** to a resident or amount **credited** or **paid** to a contractor or sub-contractor being a resident for carrying out any work (including supply of labour for carrying out any work) on which tax has not been deducted or, after deduction, has not been paid before the expiry of the time prescribed under sub-section (1) of section 200 and in accordance with the other provisions of Chapter XVII-B shall not be allowed as deduction in computing the income chargeable under the head "profits and gains of business or profession". It is further proposed to provide that where in respect of any such sum, tax has been deducted under Chapter XVII-B or paid in any subsequent year, such sum shall be allowed as deduction in computing the income of the previous year in which such tax has been paid. It is also proposed to define the expressions "commission or brokerage, fees for technical services". "professional services" and "work" used in the proposed new clause (ia).*

This amendment will take effect from 1st April, 2005, and will, accordingly, apply in relation to the assessment year 2005-2006 and subsequent years".

With reference to aforementioned amendment to section 40 of the Act, ld. counsel for the assessee pointed out that the said amendment used words 'payable' as well as 'paid' or 'credited'. However, when parliament gave final approval to the Bill, the word 'paid' or 'credited' was omitted and only word 'payable' remained in section 40(a)(ia) of the Act, which would be evident from section 40(a)(ia), which reads as under :-.

***Section 40(a) (ia)**:- any interest, commission or brokerage, [41][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, [41a] *[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:]

[41b] **[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 194H;

(*ii*) "fees for technical services" shall have the same meaning as in *Explanation 2* to clause (*vii*) of sub-section (1) of section 9;

(*iii*) "professional services" shall have the same meaning as in clause (*a*) of the *Explanation* to section 194J;

(*iv*) "work" shall have the same meaning as in *Explanation III* to section 194C;

[42][(*v*) "rent" shall have the same meaning as in clause (*i*) to the *Explanation* to section 194-I;

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

4.2. Ld. counsel submitted that in the back drop of above, the question arises as to why the legislature dropped 'credited' and 'paid' under section 40(a)(ia). He submitted that 'paid' was not incorporated because legislature knew that if amount is already paid, TDS cannot be made. Ld. counsel submitted that section 201 takes care of a situation where assessee fails to deduct tax. He further pointed out that proviso to section 40(a)(ia) gives leverage in respect of 'payable' amount to assessee to pay the amount after making TDS and avail deduction in subsequent year. Ld. counsel referred to Rule 30 of Income Tax Rules, which, inter alia, deals with time and mode of payment of tax deducted at source. He pointed out that Rule 30 prior to its substitution by the Income Tax (Sixth Amendment) Rules, 2010 with retrospective effect from 1st April, 2010 allowed two months period of time for depositing of TDS if the amount is

credited by a person to the account of the payee and one week time in any other case. The said Rule reads as under :-

> *"Rule 30 : Time and mode of payment to Government account of tax deducted at source or tax paid under sub-section (1A) of section 192 – (1) All sums deducted in accordance with the provisions of sections 192 to 194, section 194A, section 194B, section 194BB, section 194C, section 194D, section 194E, section 194EE, section 194F, section 194G, section 194H, section 194I, section 194J, section 194K, section 194LA, section 195, section 196A, section 196B, section 196C and section 196D shall be paid to the credit of the Central Government-*
>
> *(a) in the case of deduction by or on behalf of the Government, on the same day;*
>
> (b) *in the case of deduction by or on behalf of persons other than those mentioned in clause (a)-*
>
> *(i) in respect of sums deducted in accordance with the provisions of section 193, section 194A, section 194C, section 194D, section 194E, section 194G, section 194H, section 194I, section 194J, section 195, section 196A, section 196B, section 196C and section 196D-*
>
> *(1) where the income by way of interest on securities referred to in section 193 or the income by way of interest referred to in section 194A or the sum referred to in section 194C or the income by way of insurance commission referred to in section 194D or the payment to non-resident sportsmen or sports associations referred to in section 194E or the income by way of commission, remuneration or prize on sale of lottery tickets referred to in section 194G or the income by way of commission or brokerage referred to in section 194H or the income by way of rent referred to in section 194I or the income by way of fees for professional or technical services referred to in section 194J or the interest or any other sum referred to in section 195 or the income of a foreign company referred to in sub-section (2) of section 196A or the income from units referred to in section 196B or the income from foreign currency bonds or shares of an Indian company referred to in section 196C or the income of Foreign Institutional Investors from securities referred to in section 196D is credited by a person to the account of the payee as on the date up to which the accounts of such person are made, within two months of the expiration of the month in which that date fails;*
>
> (2) *in any other case, within one week from the last day of the month in which the deduction is made; and*
>
> *(ii) in respect of sums deducted in accordance with the other provisions within one week from the last day of the month in which the deduction is made.*

With reference to this Rule, ld. counsel submitted that the words 'paid' and 'payable' have different connotations and, accordingly, different time periods have been prescribed for depositing of TDS. Ld. counsel further referred to section 43, which deals with definition of certain terms relating to income from profits and gains of business or profession and pointed out that sub-section (2) defines the term 'paid' as under :-

> *"(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".*

Ld. counsel submitted that though word 'paid' has been defined, but the word 'payable' has not been defined in the Act. Ld. counsel for the assessee referred to page 6 at para 2.2 of written submissions, wherein the term 'payable' as per dictionary meaning has been mentioned. The submissions are as under :-

> *"2.2. The word' payable' as per dictionary meaning is (a) that must be paid, (b) able to be paid.*
>
> *(a) Oxford dictionary defines the terms 'payable' and 'paid' as under :-*
> *Payable (pay-a-ble- adjective [predict.]*
> *1. (of money) required to be paid; due :*
> *2. able to be paid :*
> *Noun (payables)*
> *Debts owed by a business' liabilities.*
>
> *Paid : Past and past principal of PAY.*
>
> *(b) According to Black's Law Dictionary (Seventh Edition) at p. 1150-, the term 'payable' is defined as a sum of money that is to be paid. Another meaning to the term 'payable' is given as under :-*
>
> *"An amount may be payable without being due. Debts are commonly payable long before they fall due".*
>
> *(c) According to West's Legal Thesaurus/ Dictionary Paid : means pay. To discharge a debt.*
>
> *Payable : means justly or legally due (payable immediately}. Uncollected (outstanding debts). Unpaid, undischarged, unsatisfied, unsettled, mature, owed, ripe, collectable, in arrears, redeemable.*

4.3. Ld. counsel referred to the decision of the Hon'ble Bombay High Court in the case of Abdul Gafar A. Nadiadwala –vs.- ACIT & Others reported in 267 ITR 488, wherein the Hon'ble Bombay High Court at paid 511 has observed as under :-

"With the aforesaid strongly canvassed rival views, one has to find the answer to the question raised under the provisions of the Income Tax Act. The provisions of the said Act do not define the word 'goods' or 'merchandise'. In the absence of any statutory guidelines under the Act, the dictionaries can be consulted to find out the meaning of the particular word or phrase. It is well settled that in the absence of there being anything contrary to the context, the language of a statute should be interpreted according to the plain dictionary meaning of the terms used therein. Though the dictionaries are not to be taken as authoritative exponents of the meaning of the statutory language, it is permissible to seek instruction from these books to understand the ordinary sense of the words in an enactment. At this juncture we are reminded of what Samuel Johnson, a great English Post, critic, essayist and dictionary maker, has stated :-

> *"Dictionaries are like watches, the worst is better than none, and the best cannot be expected to go quite true. Every honest lexicographer agrees knowing that no matter how keenly he strives to make his book 'go true' he would inevitably lose the battle with what might be called linguistic indeterminacy. Since indeterminacy will be the prima facie of his professional life, he will often be tempted to deny and resent, like the grammarians of the 17th & 18th centuries, the radical instability of languages".*

It is thus clear that the court can always take aid of the dictionaries".

Thus, ld. counsel submitted that keeping in view the conflicting views, dictionary meaning of the word 'payable' should be given preference. Ld. counsel further submitted that taxing provisions must receive strict construction as held by the Hon'ble Supreme Court in the case of CWT –vs.- Kripashankar Dayashanker Worah reported in [1971] 81 ITR 763 (SC) and in the case of Federation of Andhra Pradesh Chamber of Commerce and Industry and Others –vs.- State of Andhra Pradesh & Others reported in 247 ITR at page 36 (SC). He further referred to the decision of the Hon'ble Apex Court in the case of Smt. Tarulatha Shyam & Others –vs.- CIT reported in (1977) 108 ITR 345 (SC), wherein it has been held that "*it is a fundamental rule of taxation that where there is no scope for importing into the statute words which are not there, such importation would be not to construe, but to amend, the statute. Even if there is any casus omisus the defect can be remedied by the legislation alone and not by judicial interpretation*". He submitted that the term 'payable' admits only of one meaning and the construction in different way is unwarranted. He referred to page 9 of paper book containing various case laws and pointed out that in the case of Teja Constructions –vs.- ACIT, Hon'ble ITAT, Hyderabad Bench has held that the term 'payable' means the amount outstanding on the date of balance-sheet and does not include the paid amount.

4.4. Ld. counsel also relied on the decisions of the Hon'ble Supreme Court in the case of Union of India & Others –vs.- Onkar S. Kanwar & Others reported in 258 ITR 761 (SC) and in the case of CIT –vs.- Vegetable Products Limited reported in 88 ITR 192 (SC). He also submitted that section 40(a)(ia) did not cover rent, royalty and the same had been inserted by Taxation Laws (Amendment) Act, 2006 with retrospective effect from 1st April, 2006. He further submitted that if prior to amendment, rent and royalty amounts were paid or were credited to the account of payee, then no TDS was required to be made. He, therefore, submitted that TDS provisions are to be separately looked into and they cannot be examined along with section 40(a)(ia) of the Act. He submitted that in following decisions of Tribunal the word 'payable' has been interpreted and it has been held that amount paid without TDS does not cover within the ambit of section 40(a)(ia) of the Act :-

(i) Jaipur Vidyut Vitaran Nigam Lilmited –vs.- ACIT (Jaipur Bench)

(ii) Teja Constructions –vs.- ACIT (Hyderabad Bench);

(iii) K. Srinivasa Naidu –vs.- ACIT (Hyderabad Bench)';

(iv) Sanap Agroanimals Pvt. Ltd. –vs.- ACITY (Nasik –Pune Bench);

(v) SRS Real Estate Limited –vs.- Addl. CIT (Fridabad);

(vi) Shah Charulatha Milind –vs.- ITO (Pune Bench);

(vii) Alishan Realcon Pvt. Ltd. –vs.- ITO (Khurda – Cuttack Bench);

(viii) Sri Narayanbhai Dahyabhi Prajapati –vs.- ITO (Ahmedabad);

(ix) G.F. Securities –vs.- DCIT (ITA No. 1215/Mad./2009) (Chennai Bench).

Ld. counsel further referring to the decision in the case of Jaipur Vidyut Vitran Nigam Limited submitted that section 40(a)(ia), otherwise being a legal fiction, needs to be construed strictly in view of the decision of the Hon'ble Supreme Court in the case of CIT –vs.- Mother India Refrigeration Industries (P) Ltd. (1985) 155 ITR 711 (SC).

5. On behalf of Intervener M/s. Blue Marine Logistics Pvt. Ltd., Chennai, Shri B. Ramakrishnan, C.A. advanced similar contentions as advanced in the main appeal and further submitted that the words 'paid' and 'payable' are distinct and two different words having 'separate' meaning of their 'own' and, therefore, cannot be used interchangeably. He submitted that two events take place in the case of payments covered by TDS provision - first is TDS and second is payment Both events either simultaneously take place or payment can be made later

on. He submitted that separate consequences have been provided in the Act for both the events separately. Like section 200 deals with duty of person deducting tax. Section 201 prescribes consequences of failure to deduct or pay. Section 271C prescribes penalty for failure to deduct tax at source and section 276B prescribes failure to pay tax to the credit of Central Government under Chapter XII-D or XVII-B. He pointed out that merely because there is a failure to deduct tax, no transaction can take place. The assessee submitted that both the events have to be separately considered and one does not depend upon other. Ld. counsel further pointed out that TDS provisions have classified the expenses under two categories; (i) first category is of those expenses, where tax is to be deducted at source when amount is 'credited' to party account. Second category of expenses is when tax deducted at the time of payment like salary, compensation paid on land acquisition. He further referred to Rule 30 and pointed out that it does not contain all the sections of TDS provision.

He submitted that Income Tax Act did not provide third category of expenses, i.e. payment of deductible amount 'paid' without deducting of tax at source. He submitted that on careful scrutiny of Rule 30, it brings forth the distinct treatment given to nature of expenses belonging to either first category or second category as enumerated above. For the first category, extended time limit is given (however, Government deductors do not have this benefit of extended time limit) and for this two situations have been provided, i.e. credit at the time when annual accounts are made and credit at any other time of the previous year. For the second category, only one time limit is provided using the words "one week from the last day of the month in which the deduction is made", while the governing provision of this category refer to "before making payment' or 'at the time of payment thereof'. Thus, for the second category of expense, Rule did not provide for a situation of payments made without deduction of tax at source. He submitted that all the expenses referred to in section 40(a)(ia) are the expenses of 1st category. The notable omission being section 194I was rectified immediately within one year. He has made his arguments as under :-

11. To sum up, the provisions of Tax deduction at source do not contemplate a scenario of expenditure being paid out without deduction of tax at source. The reason is simple. Once payment is made without deduction of tax at source, it will render it impossible to effect deduction from such payment:

i) Technically because the whole of the amount is paid out.

ii) Practically, because payee may not be any more in the control of the payer or because payee has already paid advance tax on such amounts.

In the second case, the liability of the payer u/s 201 ceases as it was rightly explained in the department circular and upheld by the Hon'ble Apex Court in the case of Hindustan Coco Cola Beverages.

12. The mischief caused by initially using the words 'paid' is that it results in a permanent disallowance, which was not the intention of the legislation while introducing S.40(a)(ia).

13. When this mischief was brought to the notice of the Parliament by apex professional bodies like 'ICAI', wise sense prevailed and the word 'payable' is substituted.

14. Also, when S.40(a)(ia) is read in comparison with S.43B one can notice the conspicuous absence of the words 'irrespective of the previous year in which the liability to pay such sum was incurred by the assessee according to the method of accounting regularly employed by him' in section 40(a)(ia).

15. The only reason that can be drawn for such omission is that for a person following cash system of accounting, any expenditure can be claimed only at the time of payment. Since, no disallowance is contemplated for 'payments made without deduction of tax at source' the legislature did not find it necessary to provide for such contingency in S.40(a)(ia). Any other interpretation will result in an 'absurd' situation of 'permanent disallowance' to the persons following cash system of accounting in as much as the proviso to S.40(a)(ia) does not provide for such a situation.

16. In addition to all the above, S.40(a)(ia) imposing tax on 'deemed income' needs to be interpreted by 'strict rule of construction' and therefore 'interchangeability' of words 'paid' and 'payable' is not permitted.

Ld. counsel for the assessee submitted that some of the provisions will become redundant if 'payable' is held to be including 'paid'. He clarified that when estimation of profit is made, the disallowance cannot be made. Ld. counsel further submitted that income tax charges on income and not on expenditure, therefore, expenses cannot be denied if they have been incurred for the purposes of business. In this regard, he referred to the decision of the Hon'ble Supreme Court in the case of CIT –vs.- C.P. Sarathy Mudaliar [1972] 83 ITR 170 (SC) and also the decision of the Hon'ble Supreme Court in the case of CIT –vs.- Prem Bhai Parekh & Others (1970) 77 ITR 27 (SC) for the proposition that section 16(3) creating artificial income must be strictly construed. He, therefore, submitted that since on account of disallowance being made under section 40(a)(ia), expenditure actually incurred by assessee is converted into artificial income, therefore, this section should be strictly construed.

6. On behalf of second Intervener Rajamahendri Shipping & Oil Field Services Ltd., Shri Gun Hari, C.A. appeared and referred to the decision of the Hon'ble Madras High Court in the case of CIT –vs.-TVS Lean Logistics Ltd. [2007] 293 ITR 432 (Mad.) contained at page 56 of the paper book, wherein Hon'ble Madras High Court has observed that where the words of a statute are absolutely clear and unambiguous, rule of literal construction has to be followed, even if literal interpretation results in hardship or inconvenience. Court cannot enlarge the scope of legislation when the language of the provision is plain and unambiguous. It cannot add or subtract words in a statute or read something into it which is not there even if there is a defect or any omission in the words used in the legislation.

He, therefore, submitted that the word 'payable' is to be strictly construed and cannot include the term 'paid' within its ambit. He further referred to page 67 of the paper book, wherein the decision of the Hon'ble Supreme Court in the case of Raghunath Rai Bareja and Others –vs.- Punjab National Bank and Others [135 Com Cas 163] is contained, in which it has been observed as under :-

> *"It is a cardinal principle of interpretation of statute that the words of a statute must be understood in their natural, ordinary or popular sense and construed according to their grammatical meaning, unless such construction leads to some absurdity or unless there is something in the context or in the object of the statute to suggest to the contrary. The golden rule is that the words of a statute must prima facie be given their ordinary meaning. It is yet another rule of construction that when the words of the statute are clear, plain and unambiguous, then the Courts are bound to give effect to that meaning, irrespective of the consequences. It is said that the words themselves best declare the intention of the law-giver. The Courts are adhered to the principle that efforts should be made to give meaning to each and every word used by the legislature*

and it is not a sound principle of construction to brush aside words in a statute as being inapposite surpluses, if they can have a proper application in circumstances conceivable within the contemplation of the statute".

The same view has been taken by this Court in S. Mehta vs. State of Maharashtra 2001 (8) SCC 257 (vide para 34) and Patangrao Kaddam vs. Prithviraj Sajirao Yadav Deshmugh AIR 2001 SC 1121.

The literal rule of interpretation really means that there should be no interpretation. In other words, we should read the statute as it is, without distorting or twisting its language.

We may mention here that the literal rule of interpretation is not only followed by Judges and lawyers, but it is also followed by the lay man in his ordinary life. To give an illustration, if a person says "this is a pencil", then he means that it is a pencil; and it is not that when he says that the object is a pencil, he means that it is a horse, donkey or an elephant. In other words, the literal rule of interpretation simply means that we mean what we say and we say what we mean. If we do not follow the literal rule of interpretation, social life will become impossible, and we will not understand each other. If we say that a certain object is a book, then we mean it is a book. If we say it is a book, but we mean it is a horse, table or an elephant, then we will not be able to communicate with each other. Life will become impossible. Hence, the meaning of the literal rule of interpretation is simply that we mean what we say and we say what we mean.

He referred to section 191 of the Income Tax Act as per which where income-tax has not been deducted in accordance with the provisions of Chapter-XVII, then income-tax shall be payable by the assessee (payee) directly. He submitted that primary object of TDS, the power to recover the tax refer referred to in section 202 is that deduction is only one mode of recovery, which is without prejudice to any other mode of recovery. He further referred to section 205, where tax is deductible at the source under the foregoing provisions of this Chapter, the assessee shall not be called upon to pay the tax himself to the extent to which tax has been deducted from that income.

With reference to these provisions, ld. counsel submitted that once tax has been paid by the payee as per the provisions of section 191, the disallowance is called for under section 40(a)(ia) of the Act.

7. On behalf of Third Intervener - Srinivasa Rao, Shri Y. Suryachandra Rao, C.A. appeared and adopted earlier submissions made by the ld. counsel for the assessee and interveners.

8. Learned Departmental Representative submitted that section 40(a)(ia) covers the disallowance in respect of all payments made whether paid without TDS or payable on which TDS has not been deducted. Ld. DR submitted that the intention of legislature is very clear that if a particular payment is covered by the provisions contained under Chapter XVII relating to TDS, then the assessee's claim would be disallowed under section 40(a)(ia) of the Act. Learned Departmental Representative submitted that in sections from 192 to 194LB all TDS provisions are contained under Chapter XVII, which includes section 194C also and, therefore, legislative intention is same for all the sections. Ld. DR referred to the following case laws which are in favour of revenue.

(i) Jahangir Biri Factory (P) Ltd. (ITAT) 126 TTJ 567 (Kol. 2009;

(ii) Shree Choudhary Transport (ITAT) 119 TTJ 003 (Jodhpur Bench);

(iii) Dhiru Bhai Baji Bhai Patel 133TTJ 1 (Ahd.);

(iv) Gaonkar Mines 45 SOT 437 (Bang.) 2011;

(v) Ashika Stock Brokers Ltd. 56 DTR 417 (Kol.)

(vi) Rajendra Kumar 134 TTJ 244 (Bang.);

(vii) Parinika Construction (P) Ltd. 1081/Hyd./2009 dated 16.07.2010.

He also referred to following case laws which have decided the issue in favour of revenue :-

(i) Dey's Medicals (UP) (P) Ltd. 216 CTR 83 (Alld.);

(ii) ITO –vs.- M. Shankar [ITA No. 665/Mad./2009]/ [2010] 127 ITD 316

(iii) Sarala Associates 35 SOT 148 (Mum.);

(iv) Umang Dairies 36 SOT 383 (Del.).

He further referred to the decision of the Hon'ble Madras High Court in the case of Tube Investment of India Ltd. reported in 325 ITR 610 (Mad.), wherein the Hon'ble Madras High Court has upheld the constitutional validity of section 40(a)(ia) of the Act. Ld. DR further submitted that liability for TDS is a continuous liability and, therefore, it cannot be segregated between 'paid' and 'payable' amounts.

9. In regard to arguments with reference to Rule 30, ld. DR submitted that the said Rule only prescribes the procedure for remittance of TDS amount and that cannot override the Act. Ld. DR further submitted that section 40(a)(ia) has been incorporated in the Act so that TDS provisions are strictly followed and, therefore, the word 'payable' used in section is to be assigned strict interpretation keeping in view the object of legislation. He further submitted that

similar provisions contained in section 40(a)(i) relating to foreign payments are being implemented without any difficulty for the last forty years then why not the provisions of section 40(a)(ia) be also implemented effectively.

10. Ld. counsel for the assessee in rejoinder submitted that proviso becomes inoperable in case of paid amount. He further submitted that the decision of the Hon'ble Madras High Court in the case of Tube Investment of India Ltd. (supra) is not on this issue and, therefore, is not relevant. In this regard, he relied on the decision of the Hon'ble Delhi High Court in the case of Lachman Dass Bhatia Hingwala (P.) Ltd. –vs.- ACIT reported in [2011] 330 ITR 243 (Delhi) (FB), wherein it has been held as under :-

> *"A judgment has to be read in context, and discerning of factual background is necessary to understand the statement of principles laid down therein. It is obligatory to ascertain the true principle laid down in the decision and it is inappropriate to expand the principle to include what has not been stated therein.*
>
> *A decision is only an authority for what it actually decides and it is the duty to ascertain the real concrete or ratio decidendi which has binding effect. Mechanical application of a decision treating as a precedent without appreciating the underlying principle is not allowable"*

11. We have considered the submissions of both the parties and have perused the records of the case. The dispute before us is whether the term 'payable' in section 40(a)(ia) refers to entire payment on which TDS was required to be made in terms of various sections referred to in this section contained in Chapter XVII-B or it refers only to amounts payable with reference ot those sections which, as per assessee, remain outstanding as on 31st March.

The first argument of ld. counsel for the assessee is based on the intention of legislature. In this regard reference is made to the Bill, introduced in Parliament and final clause inserted in the Statute. The submission is that though in the Bill phrase 'paid' or 'credited' was there but the same was dropped and in the finally inserted clause(ia) only word 'payable' was retained. The contention is that this itself shows the intention of legislature that the payments covered under Chapter XVII-B as referred to in section 40(a)(ia) paid without making TDS are not contemplated under section 40(a)(ia) of the Act.

12. Before considering the argument of ld. counsel, we may refer to a discussion on the subject by R.W.M. Dias in his book on Jurisprudence. It is well settled Rule of interpretation that when confronted with the task of interpreting a statute, the accepted formula is that the judges seek to ascertain the 'intention of the legislature'. The problem becomes apparent when one investigates whose intention it is that is thought to be relevant. Certainly it cannot be that is incorporated in the bill presented before Parliament but the statute which is passed by Parliament. He observes that in the case of Inland Revenue Commissioner –vs.- Hinchy (1960) A.C. 748 at page 767; (1960) 1 All E.R. 505 (512) Lord Reid observed as under :-

> *"What we must look for is the intention of Parliament, and I also find it difficult to believe that Parliament ever really intended the consequences which flow from the appellant's contention. But we can only take the intention of Parliament from the words which they have used in the Act".*

An Act is the product of compromise and the interplay of many factors, the result of all this being expressed in a set form of words. It is further observed as under:-

> *"Moreover, the expression 'intention of the legislature' is ambiguous. Does it connote meaning or purpose; or, putting it in another way, does the present case fall within what the legislature 'meant' by these words, or does it fall within the purpose which they 'meant' to accomplish by the use of these words?*

Therefore, the intention of legislature is to be examined keeping in view the overall purpose for which a particular section has been incorporated in the Act. While it is generally true that cases in which the meaning is plain present small difficulty, it does sometimes happen that the meaning is plain, but the application of it to the particular case yields so extravagant a result as to cause one to hesitate. It might even raise doubts as to whether Parliament did 'intend' so strange a result.

12.1. The contention is that though a particular amount is covered by the Chapter XVII-B and, therefore, TDS was required to be made from that amount but since the amount has been paid without TDS, therefore, disallowance to this extent should not be made under section 40(a)(ia) of the Act. The contention is that consequences of non-deduction are contemplated under Chapter XVII itself and, therefore, further disallowance contemplated under section 40(a)(ia) for non-deduction of tax did not contemplate the amounts, which were paid without TDS. A close scrutiny for insertion of section 40(a)(ia) reveals that section 40(a)(ia) was inserted in order to ensure a scrupulous adherence to the TDS provision. The object of 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. Therefore, if narrow interpretation is assigned to the term 'payable', as contended by the ld counsel for the assessee, then the very object of incorporation of section 40(a)(ia) would be frustrated. If we accept the assessee's contention then an amount contemplated under Chapter XVII-B will have to be segregated into two parts - one part which has been paid within the financial year itself without complying with the provisions of TDS will escape the rigour of section 40(a)(ia), but balance amount which is payable at the end of the year would only be covered by section 40(a)(ia). We hesitate to subscribe to such a view because legislature never intended so strange a result.

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

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

12.4. In our considered opinion, there is no ambiguity in the section and term 'payable' cannot be ascribed narrow interpretation as contended by assessee. Had the intentions of the legislature were to disallow only items outstanding as on 31st March, then the term 'payable'

would have been qualified by the phrase as outstanding on 31st March. However, no such qualification is there in the section and, therefore, the same cannot be read into the section as contended by the assessee.

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

> ***Section 40(a) (ia)*** *:- any interest, commission or brokerage,* [41]*[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,* [41a]***[****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:****]***
>
> [41b]***[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 194H;*
>
> *(ii) "fees for technical services" shall have the same meaning as in Explanation 2 to clause (vii) of sub-section (1) of section 9;*
>
> *(iii) "professional services" shall have the same meaning as in clause (a) of the Explanation to section 194J;*
>
> *(iv) "work" shall have the same meaning as in Explanation III to section 194C;*
>
> [42]*[(v) "rent" shall have the same meaning as in clause (i) to the Explanation to section 194-I;*
>
> *(vi) "royalty" shall have the same meaning as in Explanation 2 to clause (vi) of sub-section (1) of section 9;]*

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

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

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

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

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

(iv) Tax is deductible at source under Chapter XVII-B in respect of amounts payable in respect of 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 :-

[95]***Interest on securities.***

[96]***193.*** *The person responsible for paying [97][to a resident] any income [98][by way of interest on securities] shall, [99][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 [1][***] at the rates in force on the amount of the interest payable.:*

[Payments to contractors and sub-contractors.

[70]***194C.***[71] [72]*[(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[73]) in pursuance of a contract between the contractor[73] 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 sum 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 [3][ten] per cent :*

.....

[Rent.

[8]***194-I.*** *Any person, not being an individual or a Hindu undivided family, who is responsible for paying to [9][a resident] any income by way of rent[10], 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, [11][deduct income-tax thereon at the rate of—*

[12][(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, [18][or]

[18][(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 [19][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 (1) of section 9;

[25][(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 makes 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 very 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 and 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. Furher, 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. –vs.- Union of India & Others [216 CTR 83 (Alld.) 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. & Anr. –vs.- ACIT & Others. 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. (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 Honbie 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 vs. Indo Nippon Chemicals Co. Ltd. (2003) 182 CTR (SC) 291 (2003) 261 ITR 275 (SC);
(ii) K.P. Varghese vs. CIT (1981) 24 CTR (SC) 358 : (1981) 131 ITR 597 (SC);
(iii) Navnit Lal C. Javeri vs. K.K. Sen, AAC (1065) 56 ITR 198 (SC);
(iv) Govind Saran Ganga Saran vs. CST (1985) 155 ITR 144 (SC);
(v)Godhira Electricity Co. Ltd. vs. CIT (1997) 139 (JR (SC) 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 vs. 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 –vs.- 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 intra 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 makers 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 point 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.

While parting, we place our deep appreciation for the assistance rendered by both the sides in deciding the question.

The appeal will now be placed before regular bench by Registry.

Mahavir Singh]	**[D. Manmohan]**	**[S.V. Mehrotra]**
Judicial Member	**Vice-President (MZ)**	**Accountant Member**
Dated : / 01/ 2012		

Copy of the order forwarded to:

1. Merilyn Shipping & Transports, Visakhapatnam.
2. Addl. CIT, Range-1, Visakhapatnam.
3. Commissioner of Income-tax (Appeals)- ,Visakhapatnam
4. CIT- , Visakhapatnam
5. DR, Vizac Benches, Visakhapatnam

(True Copy)

By Order

Assistant Registrar, I.T.A.T., Visakhapatnam

Laha, Sr. P.S.