आयकर अपीलीय अधिकरण, 'डी' न्यायपीठ, चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL
' D' BENCH : CHENNAI

श्री एन.आर.एस. गणेशन, न्यायिक सदस्य एवं
श्री चंद्र पूजारी, लेखा सदस्य के समक्ष।
[BEFORE SHRI N.R.S. GANESAN, JUDICIAL MEMBER AND
SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER]

आयकर अपील सं./I.T.A.No.422/Mds/2013
निर्धारण वर्ष /Assessment year : 2007-2008

The Assistant Commissioner of Income Tax, Central Circle IV(3) (i/c) Chennai 600 034.	**Vs.**	M/s. Trimex Industries (P) Ltd, Trimex Towers, No.1, Subbaraya Avenue, C.P. Ramasamy Raod, Alwarpet, Chennai 600 018. **[PAN AABCT 0212F]**
(अपीलार्थी/Appellant)		**(प्रत्यर्थी/Respondent)**

अपीलार्थी की ओर से/ Appellant by : Shri. P. Radhakrishnan, IRS, JCIT
प्रत्यर्थी की ओर से /Respondent by : Shri.B.S. Purushottam, C.A

सुनवाई की तारीख/Date of Hearing : 02-09-2015
घोषणा की तारीख /Date of Pronouncement : 29-10-2015

आदेश / O R D E R

PER CHANDRA POOJARI, ACCOUNTANT MEMBER

This appeal by the Revenue is directed against the order of the Commissioner of Income-tax (Appeals)-I, Chennai, dated 19.12.2012 for the assessment year 2007-2008.

2. The Revenue has raised the following grounds:-

> *'(1a)* On the facts and in the circumstances of the case, the learned Commissioner of Income Tax (Appeals) has erred in deleting the addition of ₹17,03,792/- towards adjustment on account of transfer pricing relating to Barite Lumps.
> (1b) The learned Commissioner of Income Tax (Appeals) has failed to note that the adjustment was done by the Assessing Officer as per rule 10B(1)(a) of the I.T. Rules 1962 and that this rule is to be applied for all the transaction without any exception relating to the transactions of a particular month.
>
> (2a)On the facts and in the circumstances of the case, the learned Commissioner of Income Tax (Appeals) has erred in deleting the addition of ₹28,55,313/- made by the Assessing Officer towards disallowance u/s. section 40(a)(i) relating to interest payments relating to Andhra Pradesh Mineral Development Corporation.
>
> (2b) The learned Commissioner of Income Tax (Appeals) has failed to note that interest has wide meaning as per section 2(28A) which includes other charges paid/payable in respect of debt incurred as clearly explained in the case of CIT vs. Vijay Ship Breaking Corporation 261 ITR 113 (Guj) 2003".

3. The facts of the case regarding first issue is that the assessee is an exporter of minerals exporting to its associate enterprise (A.E) as well as Non-AE. The assessee adopted CUP method, where ever the assessee has comparable transctions, and TNMM method, when comparable transactions are not available. However, A.O/T.P.O has followed CPU method for all products by obtaining export data from Customs department of various ports. The Assessing Officer compared the assessee's export and originally proposed to add ₹9,79,93,973/- for various products exported by the assessee. The

assessee submitted its objection and after considering the same a sum of ₹19,48,058/- was added under various products as under:-

Products Exported	Difference in price to be adjusted (₹)
Barite lumps	17,03,792/-
Bentonite lumps	1,59,082/-
Soda feldspar	85,184/-
Total	19,48,058/-

Aggrieved, the assessee preferred an appeal before the Commissioner of Income Tax (Appeals).

4. The Commissioner of Income Tax (Appeals) observed that the Assessing Officer added a sum of ₹17,03,792/- under the head Barite lumps by comparing the month to month sales with that of competitors from the data obtained from the customs department. It may be seen from the department working that except in the month of June export realization of the assessee in all other months are favourable. The Assessing Officer erred in making addition to the June month sales on the ground that the average price realized by the assessee is less than that of competitors. The entire provisions of transfer pricing is to determine the arms length transactions of the assessee and not a mere arithmetical exercise for making additions in unfavourable months ignoring other transactions where the

assessee has fetched higher than that of competitors. The sale price is realised depending on various factors such as demand and supply, quality, quantity and the cost to the supplier, margin of profit etc. For Eg: One of the Comparable companies GIMPEX realised only US $31.10 in the month of August, 2008, when the assessee sale price fetched US $ 41.73. However, in the relevant month June 2008, the sale price fetched by the assessee is US $35 as against US $ 42.23 fetched by GIMPEX. The inconsistency in the pricing of the comparable was not taken note of by the Assessing Officer. The reason for the comparable selling at higher price of US$ 42.23 in the month of June and then dropping it to US $ 31.10 in the subsequent month of August cannot be explained. The Commissioner of Income Tax (Appeals) further submitted that the Assessing Officer also erred by comparing the FOB sales of the assessee with the CIF sales of the competitor only by reducing the freight charges. The AO's assumption that by reducing freight from the CIF sales both are comparable is incorrect due to the reason that no further weightage is given to the higher investment and risks assumed in CIF sale. It is therefore natural that the sales made under CIF terms might command higher premium to compensate the additional investment and the higher risks assumed. The Annexure-A gives

the details of comparison made by the department which formed part of assessment order and Annexure-B gives the variance in average realisation for each month. It may be noted from Annexure - B that except in the month of June where the average realisation is less by $3.05/-- sales in other months fetched much higher rates. Accordingly, the Commissioner of Income Tax (Appeals) deleted the addition made by the Assessing Officer. Against this, the Revenue is in appeal before us.

5. The ld. Departmental Representative relied on the order of the Assessing Officer.

6. The ld. Authorised Representative submitted that the transfer pricing officer and in turn the Assessing Officer was not justified in making adjustment to the sale price on account of transfer pricing. The TPO has failed to appreciate that during the year there were six instances of sale of Barite lumps to Associated Enterprise and that in all but one instance the sale price compared favourably with the arms length price. As rightly held by the Commissioner of Income Tax (Appeals) , the TPO while making adjustment to sale price of the assesses has not given weightage to the CIF sale of the competitor. The TPO simply deducted the freight incurred by the competitor from

the sale price to arrive at the FOB price. Due weightage was not given to investment and risks associated.

7. We have heard both the parties and perused the material on record. It was brought to our notice that similar issue was decided by this Tribunal in assessee's own case in ITA No.2117/Mds/2010 for the assessment year 2006-07, dated 25.06.20.12, wherein it was held as under:-

> *''17. We have heard both sides in detail.*
>
> *18. First of all, we have to say that the DRP at Chennai has not applied their mind to the merits of the case, as explained by the assessee, before us. This position is clear from paragraph 5 of the proceedings of the DRP which is reproduced below* :
>
> > *"5. We have carefully considered the facts of the case, examined the records and considered the oral and written submissions made on behalf of the assessee. The assessee has entered into international transactions with its AEs. In this connection, the facts recorded by the T.P.O. in the T.P.O's order are not disputed. What the assessee has disputed is the interpretation of such data and facts. The learned ARs has made arguments largely on the legal issues. The T.P. audit is basically a fact based exercise. The law on transfer pricing in India is not yet fully evolved and contentious issues are not yet settled. Therefore, the assessee's reliance placed on various court decisions in support of its contention that the T.P.O. has erred in recommending the adjustment has to be understood in this background. The contentious issues pertaining to the T.P. audit are not yet settled or resolved. We therefore uphold the action of the T.P.O. in making adjustment in respect of assessee's international transactions both its AEs. Consequently, the addition of ₹*

3,90,47,634/- proposed by the A.O. is confirmed and these grounds of dispute are rejected."

19. Therefore, we straightaway go to the order passed by the TPO to examine whether the addition is called for or not.

20. It is worthwhile to mention here that an appeal filed by the Revenue for the earlier assessment year 2005-06 in assessee's own case, has been heard and disposed of by this Tribunal through our order of even date in ITA No.527/Mds/12. The findings arrived at by the Tribunal in the said order are equally applicable to the present case, as the pattern of transfer pricing analysis made by the TPO in both cases is exactly similar. The facts are identical. Therefore, the said order also may be read along with this impugned order.

21. The TPO has considered the sale value of five items, Barite Powder, Bentonite Lumps, Bentonite Powder, Potash Feldspar Lumps and Soda Feldspar Lumps. In respect of Bentonite Lumps, Bentonite Powder, Potash Feldspar lumps, the assessee has adopted TNMM method. In respect of other two items, CUP method has been used. But the TPO has made the studies by adopting CUP method for all these five items. As far as this case is concerned, the CUP method is also equally acceptable and, therefore, we are not inclined to discuss on the proper method of comparison to be adopted in this case. That study would be only academic.

22. In fact, the assessee has compared its sale price to the AE with that of the export rate of the competitor, M/s. IBC Ltd. In the case of Barite Powder, the export price by M/s. IBC Ltd. was US$ 51.65 per MT, whereas the price realized by the assessee for the shipment made in April 2005 was US$ 48.50 per MT and US$ 54.50 per MT for the shipment made in September, 2005. The average price realized by the assessee on export of

minerals to its AE is very much comparable to the price reflected in the transactions made by its competitor, M/s. IBC Ltd. As already stated, for the earlier assessment year 2005-06, the assessee is operating in a very limited sphere. The assessee and its competitor, few in number, have obtained licences from State Government undertaking of Andhra Pradesh on the basis of public auction. The dealers in this field are few in numbers. This is mainly because the exporters of bulk minerals are very few in India. Therefore, as pointed out by the assessee, there cannot be a large number of cases available for comparison.

23. The most important point is that in the case of assessment of M/s. IBC Ltd., the authorities have made a comparison with sale price recorded by the assessee and that comparison was found reasonable and no addition was made in the case of M/s. IBC Ltd. This is a sure case of double standard. The TPO has made a fundamental omission in not comparing the rate declared by M/s. IBC Ltd. while proposing the additions in the hands of the assessee company.

24. Then what is the method of comparison adopted by the TPO? This is apparent in the case of Bentonite Lumps. The TPO has adjusted the price reflected in the sale of 40 MT Bentonite Lumps made to non AE. The TPO summarily rejected the sale price reflected in the case of a sale of 23500 MT made to its AE. Is it fair to say that the export price of 23500 MT would be exactly that of a sale of 40 MT? In every trade, the volume of the consignment is a very important factor. It is to be seen that almost the entire sales of the assessee are made to AE at Dubai. Therefore, the price offered to its Dubai AE will be influenced by volume, frequency and other vital aspects of the trade. The sale of 40 MT made to non AE was an occasional sale, where the assessee was not constrained by such

considerations as applicable in the case of its AE. Therefore, it is evident that the TPO has erred in comparing the mountain with a mole hill.

25. This is the same case with Bentonite Powder, where the assessee has made a sale of 6000 MT to AE whereas the sale to non AE was just 110 MT. This is the fate of other remaining items.

26. The most glaring feature of the transfer pricing study placed before us, is that the TPO has overlooked the simple arithmetic of the case discussed in our order passed for the earlier assessment year 2005-06. We have made this point very clear that the assessee is making sales to AE on FOB basis. The assessee is making sales to non AE on CIF terms. There is a difference between CIF and FOB value. When the freight and insurance factors are excluded from the CIF value reflected in the invoice issued against the sales made to non AE, it is very clear that the said amount is very much comparable to FOB value reflected in the invoice issued against the sales made to AE. It is evident from the records that the price variation between the sale made to AE and non AE is predominantly, because of the different methods of invoicing as FOB and CIF.

27. In addition to the above, it is to be seen that the TPO has not considered the quality variation in the minerals exported by the assessee. The assessee has in fact filed chemical analysis report before the TPO to show that different consignments have different qualities depending upon the contents of potash, nitrogen etc. The chemical analysis report submitted by the assessee showed that different consignments have different chemical compositions and therefore, they vary in quality. The

price is of course, fixed on the quality of the minerals exported by the assessee.

28. The assessee has also pointed out an example to the TPO that mistakes occur sometimes in the invoices/shipping bills where Lumps are shown as Powder. Powder is sold for a better price.

29. In the light of the detailed discussion above, we come to the following findings:

> *(1) The TPO has not made any external comparison of the prices, even though the assessee has furnished the price details of M/s. IBC Ltd. The TPO has accepted the particulars furnished by M/s. IBC Ltd. in the assessment of that company whereas there is no material difference in the price quoted by the assessee and that company.*
>
> *(2) The TPO has adopted the special sale price attributable to non AEs on small quantity by ignoring the price quoted by the assessee to its AE for bulk and regular sales. The variables adopted by the TPO for making comparison are fundamentally different and, therefore, the comparison is erroneous.*
> *(3) The TPO has overlooked the basic difference between FOB and CIF value while comparing the sale price attributable to AE as well as to non AEs. While accepting the comparing sale value in the case of non AE, the TPO has ignored the factors like deployment of additional capital and risk involved.*
> *(4) The TPO has not considered quality variation in different consignments and the corresponding variations reflected in the pricing of exports.*

30. Therefore, in the facts and circumstances of the case, we find that transfer pricing study made by the TPO is far away from reality. If the erroneous presumptions of the TPO are excluded, we find that the price disclosed by the assessee is comparable and compatible to ALP and no adjustment is called for in the present case. We accordingly delete the ALP addition of ₹3,90,47,634/-."

8. Since the facts in assessment year 2007-2008 are identical, we are inclined to confirm the order of the Commissioner of Income Tax (Appeals) on this issue by placing reliance on the above order of the Tribunal. This ground of the Revenue is rejected.

9. The next ground raised by the Revenue is that the Commissioner of Income Tax (Appeals) erred in deleting the addition of ₹28,55,313/- made by the Assessing Officer towards disallowance u/s. section 40(a) (i) relating to interest payments to Andhra Pradesh Mineral Development Corporation.

10. The facts of the case are that the interest expenditure includes a sum of ₹.28,56,735/- classified as interest paid to others. This interest includes a sum of ₹1422/- paid towards interest on service tax and the balance of ₹28,55,313/-was paid to APMDC [Andhra Pradesh Mineral Development Corporation). As per the agreement with APMDC [supplier of Barites] the buyer is required to pay 104% of the value of the cargo in advance of every lot of 5000MTs. However the assessee company instead of paying advance has opened Letter of Credit (LC) in favour of APMDC Immediately upon LC opening the suppliers gives a Delivery order. These LCs are discounted by the supplier after complying with the terms of LC.

APMDC claims compensation/ interest from the date of delivery order till the date of LC realization. This entire interest paid is grouped under interest paid to others. This expense is nothing but a part of purchase costs as the supplier has different arrangements with different buyers and accordingly the prices are adjusted. Further it is so held in many cases that to claim interest u/s.36 (1) (iii), the relationship of borrower and lender is necessary. in our case as the interest payment is due to different arrangement with the supplier, this is to be treated as a part of Purchase Consideration. Hence TDS for this payment does not arise. The assessees reply was not convincing.

> *(i) The assessee has failed to deduct TDS while making interest to others amounting to ₹28,55,313/-. .*
>
> *(ii)Because of different arrangement with the supplier and the buyers and accordingly the prices are adjusted and the assessee claims that the question of TDS will not arise.*
>
> *(iii) By doing different adjustment the assessee company evaded the TDS.*

Accordingly, the Assessing Officer made an addition of ₹28,55,313/-. Aggrieved, the assessee preferred an appeal before the Commissioner of Income Tax (Appeals).

11. The Commissioner of Income Tax (Appeals) observed that it is not a question of money borrowed, and interest thereon, but a

payment made for purchase and a compensatory charge for the period of credit utilized for payment of the amount due. The compensation is referred to as interest, it cannot fall under the definition of interest and hence the disallowance made is not warranted and is directed to be deleted. Against this, the Revenue is in appeal before us.

12. The ld. Departmental Representative relied on the order of the Assessing Officer.

13. The ld. Authorised Representative submitted that the assessing officer is not justified in invoking the provisions of Sec.40(a)(ia) to the additional purchase price of goods procured from Andhra Pradesh Mineral Development Corporation by treating it as a payment in the nature of 'interest'. The Assessing Officer failed to appreciate that the additional purchase price paid by the assessee represented compensation for the credit period utilized. The CIT(A) is absolutely justified in relying on the decision rendered by the *Ahmedabad Bench of ITAT in the case of Income Tax Officer, Vs. Parag Mahasukhlal Shah (2011) 12 Taxmann.com 37(Ahd.)* wherein it was held that ''when a payment is compensatory in nature and not related to any deposit/debt/loan, then such a payment is out of ambit of the provisions of Sec.

194A". The Commissioner of Income Tax (Appeals) has relied on the decision in the case of *CIT vs. Vijay Ship Breaking Corporation 261 ITR 113 (Guj)(2003*). The ratio of the said decision cannot be applied to the case of the assessee for the simple reason that in the assessee's case, as per the agreement with APMDC (supplier of Barytes) *the buyer is required to pay* 104% *of the value of the cargo in advance for every lot of* 5000 *MTs.* The assessee company instead of paying advance has opened Letter of Credit in favour of APMDC. Immediately upon LC opening the supplier gives Delivery Order. The supplier claims compensation/interest from the date of Delivery Order to the date of realization of LC. In contract, in the case relied on by the department, *the purchase price became payable on the delivery being effected.* Here, the contract of sale itself has considered the purchase price of the ship as payable on delivery after notice of release, and that is why the interest is computed at the rate agreed for the usance period of 180 days being the credit facility given to the buyer. It is further submitted that the said case law was delivered in relation to disallowance under section 40(a)(i) and not in relation to Sec 40(a)(ia). In the light of the foregoing discussion, it is respectfully submitted that the case law relied on by the assessee is directly on the issue and hence the CIT(A) was justified in following the same.

Without prejudice to the above submission, the assessee further submits that the second proviso under sub-clause (ia) of Sec.40(a) inserted by Finance Act, 2012 w.e.f. 1/4/2013 and the proviso to Sec.201(1) inserted by the Finance Act, 2012 w.e.f. 01/07/2012 are only in the nature of clarificatory amendments and hence should be deemed to have been inserted with retrospective effect. In such an event, the assessee may not be deemed to be an assessee in default u/s 201(1) and consequently as per second proviso to Sec.40(a)(ia) the assessee shall be deemed to have deducted and paid tax in accordance with the provisions of Chapter XVII -B. It is settled law that if a statute is curative or merely declaratory of the previous law, retrospective operation is intended. An amending Act may be purely clarificatory to clear a meaning of a provision of the Principal Act which was already complicit. A clarificatory amendment of this nature will have retrospective effect, and therefore, if the Principal Act was existing law when the constitution came into force, the amending Act also will be part of the existing law. In this regard, we invite attention to the decision rendered by the Supreme Court in the case of *Allied Motors (P) Ltd. vs. CIT [1997] 91 Taxmann 205/224 ITR 677 (SC).* As per the latest decision of Allahabad High Court in the case of *CIT Vs. Vector Shipping Services (P) Ltd.* (Allahabad), Sec.40(a)(ia)

disallowance applies only to amounts 'payable' as on 31st March and not to amounts already paid during the year. The majority decision in *Merilyn Shipping 136 ITD 23(SB*) was approved by the Allahabad High Court. The SLP filed by the revenue was dismissed *in limine* by the Apex court. The ld. Authorised Representative for assessee prays that since the Commissioner of Income Tax (Appeals) has allowed the appeal on proper appreciation of facts, the Tribunal may dismiss the departmental appeal and render justice.

14. We have heard both the parties and perused the material on record. The Commissioner of Income Tax (Appeals) observed that the assessee procures barite from Andhra Pradesh Mineral Development Corporation which is a state government undertaking. This undertaking had made an initial offer with a 90 day interest free credit on supply of material. This facility was withdrawn as per the letter from the undertaking dated 4-9-2004, and the undertaking charged ₹28,55,313/- as compensation charges for the credit period utilised by the assessee. The payment made is compensatory and the decision relied upon by the assessed holds that the definition of interest covers interest payable in any manner in respect of loans, debts, deposits, claims and other similar rights or obligation. It may even include service charges but only with regard to money borrowed.

In this case, it is not a question of money borrowed, and interest thereon, but a payment made for purchase and a compensatory charge for the period of credit utilized for payment of the amount due. Though the compensation is referred to as interest, it cannot fall under the definition of interest and the hence the disallowance made is not warranted and accordingly he deleted the addition. In our opinion, the impugned payment which has direct link or immediate nexus with the trading liability being connected with the purchase payment and it will not fall under the category of interest as defined in Sec. 2(28A) of the Act. Payment made by the assessee in the present appeal cannot be termed as interest and accordingly we are in agreement with the findings of the Commissioner of Income Tax (Appeals). Without entering into the controversy so as to whether the payment is within the ambit of interest in Sec. 2(28A), the assessee is also bound to succeed in its alternative argument that the entire payment if made during the previous year relevant to the assessment year under dispute no disallowance would be made u/s.40(a)(ia) of the Act in view of the decision cited by the ld. Authorised Representative for assessee. Accordingly, this ground of the Revenue is dismissed.

15. In the result, the appeal of the Revenue in ITA No.422 /Mds/ 2013 is dismissed.

Order pronounced on Thursday, the 29th day of October, 2015, at Chennai.

By Separate Order.
(एन.आर.एस. गणेशन))
(N.R.S. GANESAN)
न्यायिक सदस्य/JUDICIAL MEMBER

Sd/-
(चंद्र पूजारी)
(CHANDRA POOJARI)
लेखा सदस्य /ACCOUNTANT MEMBER

चेन्नई/Chennai
दिनांक/Dated:29.10.2015
KV

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त (अपील)/CIT(A)
4. आयकर आयुक्त/CIT
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF

PER N.R.S. GANESAN, JUDICIAL MEMBER:

I have carefully gone through the draft order of the Ld. Accountant Member. I entirely agree with the conclusion reached by him in all the issues. However, in respect of the finding recorded by the Ld. Accountant Member for disallowance under Section 40(a)(ia) of the Income-tax Act, 1961 (in short "the Act") on the ground that the assessee has already paid the amount, I am unable to agree with the reasoning of the Ld. Accountant Member. Admittedly, what was paid by the assessee is not interest on loan or debt. The payment is compensatory nature. Therefore, the assessee may not be liable to deduct tax under Section 194A of the Act. Hence, the claim of the assessee has to be allowed. Since the Ld. Accountant Member recorded a finding alternatively, I have to express my opinion with regard to disallowance made under Section 40(a)(ia) of the Act.

2. The question now arises for consideration is whether merely because the assessee has already paid the amount on the last date of financial year, whether no disallowance could be made under Section 40(a)(ia) of the Act? This issue has been elaborately considered by the Cochin Bench of this

Tribunal in Shri Thomas George Muthoot v. ACIT in I.T.A. No. 63 & 64/Coch/2014 dated 28.08.2014. It is pertinent to note that the present Judicial Member and the Ld. Accountant Member were the Members of the Cochin Bench which delivered the order in the case of Shri Thomas George Muthoot (supra). For the purpose of convenience, I am reproducing the finding recorded by Cochin Bench of the Tribunal in Shri Thomas George Muthoot (supra):-

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

12. We have also carefully gone through the judgment of the Allahabad High Court in CIT vs M/s Vector Shipping Services (P) Ltd (supra), copy of which is filed by the assessee. The Allahabad High Court, after reproducing the relevant paragraph from the order of CIT(A) and referring to the decision of the Special Bench of this Tribunal in Merilyin Shipping & Transports (supra) found that the Tribunal has not committed an error. It is obvious that there is no discussion about the correctness or otherwise of the decision rendered by the Special Bench of this Tribunal in Merilyn Shipping & Transports (supra). However, we find that the Gujarat High Court in the case of CIT vs Sikandarkhan N Tunvar ITA Nos 905 of 2012, 709 & 710 of 2012, 333 of 2013, 832 of 2012, 857 of 2012, 894 of 2012, 928 of 2012, 12 of 2013, 51 of 2013, 58 of 2013 and 218 of 2013 judgment dated 02-05-2013 considered the decision of the Special Bench of this Tribunal in Merilyn Shipping & Transports (supra) and specifically disagreed with the principles laid down by the Special of this Tribunal in Merilyn Shipping & Transports (supra). The Calcutta High Court also in the case of Crescent Exports Syndicate & Another in ITAT 20 of 2013 and GA 190 of 2013 judgment dated 03-04-2013 considered elaborately the judgment of the Special Bench of this Tribunal in Merilyn Shipping & Transports (supra) and found that the decision rendered by the Special Bench of this Tribunal is not the correct law. It is well settled principles of law that when different High Courts expressed different opinions on a point of law, then, normally, the benefit of doubt under the taxation law would go to the assessee. It is also equally settled principles of law that the judgment which discusses the point in issue elaborately and gives an elaborate reasoning has to be preferred when compared to the judgment which has no reasoning and discussion. Admittedly, the Calcutta High Court and Gujarat High Court have discussed the issue elaborately and the specific reasoning has also been recorded as to why the Special Bench is not correct. Therefore, this Tribunal is of the considered opinion that the judgments of the Calcutta High Court Crescent Exports Syndicate & Another (supra) and Gujarat High Court in

Sikandarkhan N Tunvar (supra) have to be preferred when compared to the Allahabad High Court in M/s Vector Shipping Services (P) Ltd (supra).

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

Calcutta High Court in Crescent Exports Syndicate & Another (supra)

> *"Before dealing with the submissions of the learned Counsel appearing for the assessees in both the appeals we have to examine the correctness of the majority views in the case of Merilyn Shipping.*
>
> *We already have quoted extensively both the majority and the minority views expressed in the aforesaid case. The main thrust of the majority view is based on the fact "that the Legislature has replaced the expression "amounts credited or paid" with the expression 'payable' in the final enactment.*
>
> *Comparison between the pre-amendment and post amendment law is permissible for the purpose of ascertaining the mischief sought to be remedied or the object sought to be achieved by an amendment. This is precisely what was done by the Apex Court in the case of CIT Vs. Kelvinator reported in 2010(2) SCC 723. But the same comparison between the draft and the enacted law is not permissible. Nor can the draft or the bill be used for the purpose of regulating the meaning and purport of the enacted law. It is the finally enacted law which is the will of the legislature.*
>
> *The Learned Tribunal fell into an error in not realizing this aspect of the matter.*
>
> *The Learned Tribunal held "that where language is clear the intention of the legislature is to be gathered from the language used". Having held so, it was not open to seek to interpret the section on the basis of any comparison between the draft*

and the section actually enacted nor was it open to speculate as to the effect of the so-called representations made by the professional bodies.

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

Having held so was it open to the Tribunal to seek to justify that "this fiction cannot be extended any further and, therefore, cannot be invoked by Assessing Officer to disallow the genuine and reasonable expenditure on the amounts of expenditure already paid"? Does this not amount to deliberately reading something in the law which is not there? We, as such, have no doubt in our mind that the Learned Tribunal realized the meaning and purport of Section 40(a)(ia) correctly when it held that in case of omission to deduct tax even the genuine and admissible expenses are to be disallowed. But they sought to remove the rigour of the law by holding that the disallowance shall be restricted to the money which is yet to be paid. What the Tribunal by majority did was to supply the casus omissus which was not permissible and could only have been done by the Supreme Court in an appropriate case. Reference in this regard may be made to the judgment in the case of Bhuwalka Steel Industries vs. Bombay Iron & Steel Labour Board reported in 2010(2) SCC 273.

'Unprotected worker' was finally defined in Section 2(11) of the Mathadi Act as follows:-

''unprotected worker' means a manual worker who is engaged or to be engaged in any scheduled employment." The contention raised with reference to what was there in the bill was rejected by the Supreme Court by holding as follows: "It must, at this juncture, be noted that in spite of Section 2(11), which included the words "but for the

provisions of this Act is not adequately protected by legislation for welfare and benefits of the labour force in the State", these precise words were removed by the legislature and the definition was made limited as it has been finally legislated upon. It is to be noted that when the Bill came to be passed and received the assent of the Vice-President on 05-06-1969 and was first published in the Maharashtra Government Gazette Extraordinary, Part IV on 13-06-1969, the aforementioned words were omitted. Therefore, t his would be a clear pointer to the legislative intent that the legislature being conscious of the fact and being armed with all the Committee reports and also being armed with the factual data, deliberately avoided those words. What the appellants are asking was to read in that definition, these precise words, which were consciously and deliberately omitted from the definition. That would amount to supplying the casus omissus and we do not think that it is possible, particularly, in this case. The law of supplying the casus omissus by the courts is extremely clear and settled that though this Court may supply the casus omissus, it would be in the rarest of the rate case and thus supplying of this casus omissus would be extremely necessary due to the inadvertent omission on the part of the legislature. But, that is certainly not the case here.

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

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

The language used in the draft was unclear and susceptible to giving more than one meaning. By looking at the draft it could be said that the legislature wanted to treat the payments made or credited in favour of a contractor of subcontractor differently than the payments on account of interest, commission or brokerage, fees for professional services or fees for technical services because the words "mounts credited or paid" were used only in relation to a contractor of sub-contractor. This differential treatment was not intended. Therefore, the legislature provided that the amounts, on which tax is deductible at source under XVII-B payable on account of interest, commission or brokerage, rent, royalty, fees for professional services or fees for technical services or to a contractor of sub-contractor shall not be deducted in com putting the income of an assessee in case he has not deducted, or after deduction has not paid within the specified time. The language used by the legislature in the finally enacted law is clear and unambiguous whereas the language used in the bill was ambiguous.

A few words are now necessary to deal with the submission of Mr. Bagchi and Ms. Roychowdhuri. There can be no denial that the provision in question is harsh. But that is no ground to read the same in a manner which was not intended by the legislature. This is our answer to the submission of Mr. Bagchi. The submission of Mr. Roychowdhuri that the second proviso sought to become effective from 1st April, 2013 should be held to have already become operative prior to the appointed date cannot also be acceded to for the same reason indicated above. The law was deliberately made harsh to secure compliance of the provisions requiring deductions of tax at source. It is not the case of an inadvertent error.

For the reasons discussed above, we are of the opinion that the majority views expressed in the case of Merilyn Shipping & Transports are not acceptable. The

submissions advanced by learned advocates have already been dealt with and rejected."

Gujarat High Court in Sikandarkhan N Tunvar(supra)

"23. Despite this narrow interpretation of section 40(a)(ia), the question still survives if the Tribunal in case of M/s Merilyn Shipping &Transpors vs. ACIT (supra) was accurate in its opinion. In this context, we would like to examine two aspects. Firstly, what would be the correct interpretation of the said provision. Secondly, whether our such understanding of the language used by the legislature should waver on the premise that as propounded by the Tribunal, this was a case of conscious omission on the part of the Parliament. Both these aspects we would address one after another. If one looks closely to the provision, in question, adverse consequences of not being able to claim deduction on certain payments irrespective of the provisions contained in Sections 30 to 38 of the Act would flow if the following requirements are satisfied:-

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

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

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

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

24. What this Sub-Section, therefore, requires is that there should be an amount payable in the nature described above, which is such on which tax is deductible at source under Chapter XVII-B but such tax has not been deducted or if deducted not paid before the due date. This provision nowhere

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

he Supreme Court in the case of Commissioner of Income-Tax, Gujarat vs. AshokbhaiChimanbhai (supra), would no6t alter this situation. The said decision, of course, recognizes the concept of ascertaining the profit and loss from the business or profession with reference to a certain period i.e. the accounting year. In this context, last date of such accounting period would assume considerable significance. However, this decision nowhere indicates that the events which take place during the accounting period should be ignored and the ascertainment of fulfilling a certain condition provided under the statute must be judged with reference to last date of the accounting period. Particularly, in the context of requirements f Section 40(a)(ia) of the Act, we see no warrant in the said decision of the Supreme Court to apply the test of payability only as on 31st March of the year under consideration. Merely because, accounts are closed on that date and the computation of profit and loss is to be judged with reference to such date, does not mean that whether an amount is payable or not must be ascertained on the strength of the position emerging on 31t March.

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

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

27 to 36……..

37. In our opinion, the Tribunal committed an error in applying the principle of conscious omission in the present case. Firstly, as already observed, we have serious doubt

whether such principle can be applied by comparing the draft presented in Parliament and ultimate legislation which may be passed. Secondly, the statutory provisions is amply clear.
38. In the result, w are of the opinion that Section 40(a)(ia) would cover not only to the amounts which are payable as on 20 ITA No. 63&64m 83-85&7-72/Coch/2014 31st March of a particular year but also which are payable at any time during the year. Of course, as long as the other requirement of the said provision exist. In that context, in our opinion the decision of the Special Bench of the Tribunal in the case of M/s Merilyn Shipping & Transports vs ACIT (supra), does not lay down correct law."

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

3. In view of the above, I am of the considered opinion that the Members cannot take a different view merely because we are sitting in Chennai Bench. The assessee, Shri Thomas George Muthoot, in fact, challenged the order of the Cochin Bench of this Tribunal before the Kerala High

Court in ITA.No.278 of 2014. The Kerala High Court, by judgment dated 3rd July, 2015, confirmed the order of the Cochin Bench of this Tribunal. For the purpose of convenience, I am reproducing the relevant portion of the judgment of Kerala High Court in Shri Thomas George Muthoot v. CIT in ITA.No.278 of 2014 dated 3rd July, 2015:-

> "17. Another contention that was pressed into service was that the appellants had already paid the amount and therefore, the provisions of Section 40(a)(ia), applicable only in respect of the amount which remains to be payable on the last day of the financial year, is not attracted. Therefore, according to the appellants, disallowance cannot be sustained. This contention was sought to be substantiated by relying on the judgment of the Allahabad High Court in Commissioner of Income Tax v. Vector Shipping Services (P) [(2013) 357 ITR 642 (All)]. Primarily, this contention should be answered with reference to the language used in the statutory provision. Section 40(a)(ia) makes it clear that the consequence of disallowance is attracted when an individual, who is liable to deduct tax on any interest payable to a resident on which tax is deductible at source, commits default. The language of the Section does not warrant an interpretation that it is attracted only if the interest remains payable on the last day of the financial year. If this contention is to be accepted, this Court will have to alter the language of Section 40(a)(ia) and such an interpretation is not permissible. This view

> that we have taken is supported by judgments of the Calcutta High Court in Crescent Exports Syndicate and another [ITAT 20 of 2013] and the Gujarat High Court in the case of Commissioner of Income Tax v. Sikandadarkhan N. Tunvar [ITA Nos.905 of 2012 & connected cases], which have been relied on by the Tribunal."

4. In fact, the Punjab & Haryana High Court has also taken a similar view as that of the Kerala High Court. The Income-tax Act, being a Central enactment, is applicable to throughout India. Therefore, judicial discipline requires interpretation of law uniformly in all the States. Merely because the Members are sitting in Chennai Bench of this Tribunal, that cannot be a reason to take different view when the same Members have taken a particular view in Cochin Bench of this Tribunal. The fact remains that the Kerala High Court has confirmed the order of Cochin Bench to which both the Members are party. Therefore, in the absence of any contrary view by the Jurisdictional High Court, there is no reason to take a view other than the one taken by Cochin Bench of this Tribunal.

5. With the above reason, I am of the considered opinion that Section 40(a)(ia) of the Act is applicable not only for the

amount paid by the assessee but also the amount yet to be paid and given credit in the accounts of the assessee. As already observed, however, the assessee is not liable to deduct tax under Section 194A of the Act. Therefore, the CIT(Appeals) has rightly allowed the claim of the assessee.

6. In the result, the appeal filed by the Revenue is dismissed.

Sd/-
(N.R.S. Ganesan)
Judicial Member

Chennai,
Dated, the 29th October, 2015.

Kri.