IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH : BANGALORE

BEFORE SHRI N.V. VASUDEVAN, VICE PRESEIDENT
AND
SHRI PADMAVATHY S, ACCOUNTANT MEMBER

SP No.31/Bang/2022 AND ITA No.503/Bang/2022
Assessment year : 2017-18

Expat Engineering India Ltd., Carlton Towers, A Wing, 3rd Floor, Unit No.301-314, No.1, Old Airport Road, Bangalore – 560 008. **PAN: AABCE 9003D**	Vs.	The Deputy Commissioner of Income Tax, Circle 2(1)(2), Bangalore.
APPELLANT / APPLICANT		RESPONDENT

Appellant by	:	Shri Rajgopal, CA
Respondent by	:	Smt. Priyadarshini Baseganni, Addl.CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	20.07.2022
Date of Pronouncement	:	01.08.2022

O R D E R

Per Padmavathy S., Accountant Member

The appeal is directed against the order of the CIT(Appeals), National Faceless Appeal Centre (NFAC), Delhi dated 12.8.2021 for the assessment year 2017-18.

2. The assessee company is engaged in the business of construction services in respect of commercial/industrial building and civil structures. It filed the return of income u/s. 139(1) of the Income-tax Act, 1961 [the Act] on 21.3.2018 declaring income of Rs.3,21,57,430. The AO made certain disallowances in the assessment order u/s. 143(3) of the Act which was confirmed by the CIT(Appeals). Aggrieved, the assessee is in appeal before the Tribunal.

3. Ground Nos.1, 2 and 9 to 11 are general in nature not requiring any adjudication.

4. Ground Nos.3 to 7 raised by the assessee relates to disallowance of employees' contribution to provident fund (PF) and employees state insurance (ESI) of Rs.6,19,914 u/s. 2(24)(x) r.w.s. 36(1)(va) r.w.s. 43B of the Income-tax Act, 1961 [the Act] made by the AO and upheld by the CIT(Appeals).

5. The ld. AR submitted that the employees contribution of PF and ESI was paid before the due date of filing of return of income u/s. 139(1) of the Income-tax Act, 1961 [the Act] and was thus allowable u/s 43B of the Act. The Bangalore Tribunal has adjudicated the issue that amendment to provisions of section 43B r.w.s. 36(1)(va) by the Finance Act, 2021 is prospective in nature and applicable from 1.4.2021.

6. The ld. DR supported the orders of the lower authorities.

7. We find that this issue is squarely covered in favour of the assessee by the decision of the coordinate Bench of this Tribunal in the case of *M/s.Shakuntala Agarbathi Company v. DCIT, ITA No.385/Bang/2021 (order dated 21.10.2021)*. The relevant findings of the Tribunal are as follows:-

> "7. We have heard rival submissions and perused the material on record. Admittedly, the assessee has remitted the employees' contribution to ESI before the due date for filing of return u/s 139(1) of the I.T. Act. The Hon'ble jurisdictional High Court in the case of Essae Teraoka (P.) Ltd. v. DCIT reported in 366 ITR 408 (Kar.) has categorically held that the assessee would be entitled to deduction of employees' contribution to ESI provided the payment was made prior to the due date of filing of return of income u/s 139(1) of the I.T. Act. The Hon'ble jurisdictional High Court differed with the judgment of the Hon'ble Gujarat High Court in the case of CIT v. Gujarat State Road Transport Corporation reported in 366 ITR 170 (Guj.). The Hon'ble High Court was considering following substantial question of law:-
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> > "Whether in law, the Tribunal was justified in affirming the finding of Assessing Officer in denying the appellant's claim of deductions of the employees contribution to PF/ESI alleging that the payment was not made by the appellant in accordance with the provisions u/s 36[1][va] of the I.T. Act?"
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> 7.1 In deciding the above substantial question of law, the Hon'ble High Court rendered the following findings:-
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> > "20. Paragraph-38 of the PF Scheme provides for Mode of payment of contributions. As provided in sub para (1), the employer shall, before paying the member, his wages, deduct his contribution from his

> wages and deposit the same together with his own contribution and other charges as stipulated therein with the provident fund or the fund under the ESI Act within fifteen days of the closure of every month pay. It is clear that the word "contribution" used in Clause (b) of Section 43B of the IT Act means the contribution of the employer and the employee. That being so, if the contribution is made on or before the due date for furnishing the return of income under sub-section (1) of Section 139 of the IT Act is made, the employer is entitled for deduction.
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> 21. The submission of Mr. Aravind, learned counsel for the revenue that if the employer fails to deduct the employees' contribution on or before the due date, contemplated under the provisions of the PF Act and the PF Scheme, that would have to be treated as income within the meaning of Section 2(24)(x) of the IT Act and in which case, the assessee is liable to pay tax on the said amount treating that as his income, deserves to be rejected.
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> 22. With respect, we find it difficult to endorse the view taken by the Gujarat High Court. We agree with the view taken by this Court in W.A.No.4077/2013.
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> 23. In the result, the appeal is allowed and the substantial question of law framed by us is answered in favour of the appellant-assessee and against the respondent-revenue. There shall be no order as to costs."

7.2 The further question is whether the amendment to section 36[1][va] and 43B of the Act by Finance Act, 2021 is clarificatory and declaratory in nature. The Hon'ble Supreme Court in the recent judgment in the case of M.M. Aqua Technologies Limited v. CIT reported in (2021) 436 ITR 582 (SC) had held that retrospective provision in a taxing Act which is "for the removal of doubts" cannot be

presumed to be retrospective, if it alters or changes the law as it earlier stood (page 597). In this case, in view of the judgment of the Hon'ble jurisdictional High Court in the case of Essae Teraoka (P.) Ltd. v. DCIT (supra) the assessee would have been entitled to deduction of employees' contribution to ESI, if the payment was made prior to due date of filing of the return of income u/s 139(1) of the I.T. Act. Therefore, the amendment brought about by the Finance Act, 2021 to section 36[1][va] and 43B of the I.T. Act, alters the position of law adversely to the assessee. Therefore, such amendment cannot be held to be retrospective in nature. Even otherwise, the amendment has been mentioned to be effective from 01.04.2021 and will apply for and from assessment year 2021-2022 onwards. The following orders of the Tribunal had categorically held that the amendment to section 36[1][va] and 43B of the Act by Finance Act, 2021 is only prospective in nature and not retrospective.

(i) Dhabriya Polywood Limited v. ACIT reported in (2021) 63 CCH 0030 Jaipur Trib.

(ii) NCC Limited v. ACIT reported in (2021) 63 CCH 0060 Hyd Tribunal.

(iii) Indian Geotechnical Services v. ACIT in ITA No.622/Del/ 2018 (order dated 27.08.2021).

(iv) M/s.Jana Urban Services for Transformation Private Limited v. DCIT in ITA No.307/Bang/2021 (order dated 11th October, 2021)

7.3 In view of the aforesaid reasoning and the judicial pronouncements cited supra, the amendment by Finance Act, 2021 to Sec.36[1][va] and 43B of the Act will not have application to relevant assessment year, namely A.Y. 2019-2020. Accordingly, we direct the A.O. to grant deduction in respect of employees' contribution to ESI since the assessee has made payment before the due date of filing of the return

of income u/s 139(1) of the I.T. Act, It is ordered accordingly."

8. Following the decision of the Co-ordinate Bench in the case of *M/s.Shakuntala Agarbathy Company (supra)* and also the binding decision of the Hon'ble jurisdictional High Court in the case of *Essae Teraoka Pvt. Ltd. v. DCIT (supra)*, we hold that the employee's contribution paid by the assessee before the due date of filing the return of income u/s.139(1) of the Act is allowable as a deduction and the addition is deleted.

9. Ground No.8 is regarding disallowance of interest on TDS of Rs.5,45,375. The AO noticed that the assessee had debited Rs.28,55,978 to P&L account under the head "Interest – delayed statutory payments". From the details of break-up submitted by the assessee, the AO held that Rs.5,45,375 was an expense towards interest on TDS which is penal in nature and not allowable u/s. 37(1) of the Act.

10. On appeal, the CIT(Appeals) relying on the decision of the ITAT Delhi Bench in the case of *New Modern Bazaar v. ITO in ITA No.590/Del/2018 dated 8.4.2021* and the Madras High Court judgment in *CIT v. Chennai Properties & Investment Ltd. (1999) 239 ITR 435 (Mad)* as well as Bangalore Tribunal decision in the case of *Velankani Information Systems Ltd. v. DCIT [2018] 97 taxmann.com 599* held that interest on late payment of TDS is not eligible business

expenditure and confirmed the order of the AO. Aggrieved, the assessee is in appeal before us.

11. We have considered the rival submissions and perused the material on record. The coordinate Bench of this Tribunal in *Velankani Information Systems Ltd. (supra)* dealt with this issue and held that interest on delayed payment of TDS cannot be allowed as deduction. The relevant observations of the Tribunal are as follows:-

> "21. As far as delay in remittance of tax deducted at source u/s. 201(1A) of the Act is concerned, we find that the Hon'ble Madras High Court has taken a view that interest paid u/s. 201(1A) is also in the nature of tax and notwithstanding the fact that it is not the tax liability of the assessee, the same cannot be allowed as a deduction. The following were the relevant observations of the Hon'ble Madras High Court:—
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> > "14. As already noticed the payment of interest takes colour from the nature of the levy with reference to which such interest is paid and the tax required to be but not paid in time, which rendered the assessee liable for payment of interest was in the nature of a direct tax and similar to the income-tax payable under the Income-tax Act. The interest paid under Section 201(1A) of the Act, therefore, would not assume the character of business expenditure and cannot be regarded as a compensatory payment as contended by learned counsel for the assessee.
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> > 15. Counsel for the assessee in support of his submission that the interest paid by the assessee was merely compensatory in character besides relying on the case of Makalakshmi Sugar Mills Co. also relied on the decision of the apex court in the cases of Prakash Cotton Mills Pvt Ltd. v. CIT [1993] 201 ITR 684; Malwa Vanaspati and Chemical Co. v. CIT [1997] 225 ITR 383 and CIT v. Ahmedabad Cotton Manufacturing Co. Ltd. [1994] 205 ITR 163. In all these cases, the court was concerned with an indirect tax payable by the assessee in the course of its business and admissible as business expenditure. Further

liability for interest which had been incurred by the assessee therein was regarded as compensatory in nature and allowable as business expenditure.

16. The ratio of those cases is not applicable here. Income-tax is not allowable as business expenditure. The amount deducted as tax is not an item of expenditure. The amount not deducted and remitted has the character of tax and has to be remitted to the State and cannot be utilised by the assessee for its own business. The Supreme Court in the case of Bharat Commerce and Industries [1998] 230 ITR 733, rejected the argument advanced by the assessee that retention of money payable to the State as tax or income-tax would augment the capital of the assessee and the expenditure incurred, namely, interest paid for the period of such retention would assume character of business expenditure. The court held that an assessee could not possibly claim that it was borrowing from the State, the amounts payable by it as income-tax, and utilising the same as capital in its business, to contend that the interest paid for the period of delay in payment of tax amounted to a business expenditure".

(emphasis supplied)

22. The decision cited by the ld. counsel for the assessee of Kolkata Bench of the Tribunal on the issue is contrary to the decision of the Hon'ble Madras High Court. Though the decision of the Tribunal is later in point of time, judicial discipline demands that the decision of the Hon'ble Madras High Court is to be followed. It is also worthwhile to mention that the Kolkata Bench of Tribunal in the case of Narayani Ispat (P.) Ltd. (supra), which was cited by the ld. counsel for the assessee, did not consider or did not have an occasion to consider the decision of the Hon'ble Madras High Court in the case of Chennai Properties and Investment Ltd. (supra). In these circumstances, we follow the decision of the Hon'ble Madras High Court & uphold the order of the CIT(A) insofar as it relates to disallowance of interest on delayed remittance of tax deducted at source u/s. 201(1A) of the Act.”

12. Following the above decision of the Tribunal, we hold that interest on delayed payment of TDS is not an allowable deduction and dismiss the ground raised by the assessee. The ld. AR submitted a detailed written submission on various case laws which we will discuss in the ensuing paras.

13. At the outset it has to be mentioned that the question whether interest paid u/s.201(1A) of the Act, is an allowable business expenditure has to be examined within the parameters of Sec.37(1) of the Act and not on the basis of the prohibition contained in Sec.40a(ii) of the Act. Sec.37(1) of the Act provides that expenditure which is not capital or personal in nature laid out or expended wholly and exclusively for the purpose of business shall be allowed in computing the income chargeable under the head "profits and gains of business or profession". Sec.40(ii) provides that any sum paid on account of any rate or tax levied on the profits and gains of any business or profession or assessed at a proportion of, or otherwise on the basis of any such profits or gains, shall not be deducted in computing the income chargeable under the head "profits and gains of business or profession". Both these sections operate in different fields, the former is an enabling provision while the latter is a disabling provision.

14. The question directly arose for consideration before the Hon'ble Supreme Court in the case of Bharat Commerce and Industries Ltd. v. CIT [1998] 230 ITR 733 and the question that was considered by the Hon'ble Supreme Court in that case was whether payments required to be made by way of income-tax 'under the Income-tax Act are not

deductible as expenditure and the further amounts which a person may be required to pay by a reason of failure to comply with the provisions requiring the payments of the tax are also amounts which cannot be regarded as deductible expenditure under Section 37 of the Act. The exact question considered by the Hon'ble Court was:-

> "Whether on the facts and in the circumstances of the case the claim for deduction of interest levied under Section 139 to the extent of Rs. 11,470/- and interest levied under Section 215 to the extent of Rs. 1,04,339/- was rightly rejected as not allowable under Section 37 of the Income-Tax Act, 1961 for the assessment year 1972-73?"

15. The Hon'ble Court held as follows:

> "It cannot be said, in the present case, that the payment of interest is in any way an expense incurred wholly or exclusively for the purpose of assessee's business. Nor is it a payment made for the purpose of preserving and protecting the assessee's business as in the case of Birla Cotton Mills (supra).
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> Apart from section 37, the assessee has also present into service Section 36(1) (iii) which permits deduction in respect of the amount of interest paid in respect of capital borrowed for the purposes of the assessee's business or profession. For the reasons set out earlier, the claim for deduction under section 36(1)(iii) is also misconceived just as the assessee's claim under section 37 is misconceived.
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> In the premises, the question raised has to be answered in favour of the revenue and against the assessee. The appeals are, therefore, dismissed with costs."

16. Therefore it is clear that the basis why tax or interest is not allowed as deduction u/s.37(1) of the Act is on the reasoning that it cannot be regarded as an expense incurred wholly or exclusively for

the purpose of Assessee's business. Therefore the allowability of interest on taxes paid should not be looked out from the definition of tax as given in Sec.2(43) of the Act. The submissions made by the learned counsel for the Assessee are based on a misconception that the definition of interest u/s.2(43) of the Act is relevant and that the disallowance in question has to be judged in the parameters of Sec.40(a)(iib) of the Act. We shall now deal with the various submissions made by the learned counsel for the Assessee.

17. In the case of *HarshadShantilalMehta vs Custodian, (1998) 231 ITR 871 (SC)* the Supreme Court was concerned with the interpretation of Sec.11 of The Special Court (Trail of Offenders Relating Transactions in Securities) Act, 1992, (hereinafter referred to as the Special Act) which reads thus:-

> "11. Discharge of liabilities -
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> (1) Notwithstanding anything contained in the Code and any other law for the time being in force, the Special Court may make such order as it may deem fit directing the Custodian for the disposal of the property under attachment. (2) The following liabilities shall be paid or discharged in full, as far as may be, in the order as under :-
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> (a) all revenues, taxes, cesses and rates due from the persons notified by the Custodian under sub-section (2) of Sec.3 to the Central Government or any State Government or any local authority
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> (b) all amounts due from the person so notified by the Custodian to any bank of financial institution or mutual fund; and

(c) any other liability as may be specified by the Special Court from time to time."

18. The Hon'ble Supreme Court framed the following questions for consideration:-

(1) What is meant by revenues, taxes, cesses and rates due?

Does the word "due" refer merely to the liability to pay such taxes etc., or does it refer to a liability which has crystalised into a legally ascertained sum immediately payable?

(2) Do the taxes (in clause (a) of Section 11(2) refer only to taxes relating to a specific period or to all taxes due from the notified person?

(3) At what point or time should the taxes have become due?

(4) Does the Special Court have any discretion relating to the extent of payments to be made under Section 11(2)(a) from out of the attached funds/property?

(5) Whether taxes include penalty or interest? …..

19. While answering Question No.5, the Court held:-

"One other connected question remains: whether "taxes" under Section 11(2)(a) would include interest or penalty as well? We are concerned in the present case with penalty and interest under the Income Tax Act. Tax, penalty and interest are different concepts under the Income Tax Act. The definition of "tax" under Section 2(43) does not include penalty or interest. Similarly, under Section 157, it is provided that when any tax, interest, penalty, fine or any other sum is payable in consequence of any order passed under this Act, the Assessing Officer shall serve upon the assessee a notice of demand as prescribed. Provisions for imposition of penalty and interest are distinct from the provisions for imposition of tax. Learned Special Court judge, after examining various authorities in paragraphs 61 to 70 of his

> judgment, has come to the conclusion that neither penalty nor interest can be considered as tax under Section 11(2)(a). We agree with the reasoning and conclusion drawn by the Special Court in this connection."

20. As can be seen from the issue involved in the aforesaid case, it was a case where the Hon'ble Court had to decide whether interest liability is also liability within the meaning of Sec.11(2)(a) of the Special Act. The aforesaid decision rendered in a different context cannot be extended to the provisions of Sec.37(1) of the Act and hence the aforesaid decision is not of any relevance to the issue in this appeal. In assessee's case the issue under consideration is the allowability of interest u/s.201(1A) as deduction u/s.37(1) of the Act and therefore the decision of the Hon'ble Supreme Court can be applied.

21. The next case referred is *Arthur Anderson & Co vs ACIT (2010) 324 ITR 240 (Bombay)*. The issue considered in that case was with regard validity of initiation of reassessment proceedings u/s.147 of the Act. The Court found that material on the record before the Court showed that in the statement of total income the assessee had disclosed an interest income of Rs.50.14 lacs as income from other sources. In the note appended to the statement of computation, under the heading 'interest income' the assessee stated that this represented interest received under Section 244-A of the Income Tax Act, 1961 net of interest paid under Section 220, based on the ratio of certain judgments. The Court held that it cannot be stated that there was a failure on the part of the assessee to fully and truly disclose all the material facts relating to the assessment. Incidentally, they also observed as follows:-

> "9. Apart from the fact that there has been no failure on the part of the assessee to make a full and true disclosure of all material facts, it will be necessary to advert to the decision of the Supreme Court in Harshad Shantilal Mehta v. Custodian the Supreme Court, in the course of its judgment observed that under the Income Tax Act, 1961 the definition of tax under Section 2(43) does not include penalty or interest and that the concepts of tax, penalty and interest are different concepts under the Act. Justice Sujata Manohar speaking for a Bench of three Learned Judges of the Supreme Court observed thus :
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> "We are concerned in the present case with penalty and interest under the Income-tax Act. Tax, penalty and interest are different concepts under the Income-tax Act. The definition of "tax" under section 2(43) does not include penalty or interest. Similarly, under section 156, it is 2 (1998) 231 ITR 871.
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> provided that when any tax, interest, penalty, fine or any of other sum is payable in consequence of any order passed under this Act, the Assessing Officer shall serve upon the assessee a notice of demand as prescribed. The provisions for imposition of penalty and interest are distinct from the provisions for imposition of tax."
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> 10. The decision of the Supreme Court was delivered in an appeal which arose out of the Special Court (Trial of Offences Relating to Transaction in Securities) Act, 1992. The interpretation which has been placed on the provisions of Section 2(43) and the observations of the Supreme Court noted earlier, however, bind this Court as regards the ground on which the reopening of the assessment has been sought in this case."

22. It can thus be seen that the aforesaid observations were in a different context of full and fair disclosure of material facts and the ratio cannot be extended to the allowability of deduction u/s.37(1) of the Act.

23. In the case of *CIT vs Oryx Finance & Investment (P) Ltd (2017) 83 taxmann.com 194 (Bombay)* it was held that for the purpose of penalty u/s.221 "tax in arrears" would not include interest payable

u/s.220(2) and not applicable to allowing interest paid u/s. 201(1A) of the Act as deduction u/s.37(1) of the Act.

24. The case of *Maganbhai Hansrajbhai Patel vs ACIT [2012] 26 taxmann.com 226 (Gujarat)* is again a case on interpretation of Sec.2(43) of the Act, which we have already distinguished in the earlier part of this order.

25. The learned counsel for the Assessee has also placed reliance on the following decisions, viz., *Director of Income Tax vs Italian Thai Development Co. Ltd (2012) 17 taxmann.com 172 (Delhi Trib) & (2014) 45 taxmann.com 61 (Delhi HC),* wherein the disallowance u/s.40(a)(ii) was deleted on the basis that the gross amount including the tax is to be allowed. The next case quoted in *DCIT vs Karan Johar (2011) 11 taxmann.com 268 (Mumbai)* was also a case of allowability u/s.40(ii) of the Act. We have in the earlier part of this order already held that the question whether interest paid u/s.201(1A) of the Act is an allowable business expenditure has to be examined within the parameters of Sec.37(1) of the Act and not on the basis of the prohibition contained in Sec.40a(ii) of the Act. Sec.37(1) of the Act provides that expenditure which is not capital or personal in nature laid out or expended wholly and exclusively for the purpose of business shall be allowed in computing the income chargeable under the head "*profits and gains of business or profession*". Sec.40(ii) provides that any sum paid on account of any rate or tax levied on the profits and gains of any business or profession or assessed at a proportion of, or

otherwise on the basis of any such profits or gains, shall not be deducted in computing the income chargeable under the head “profits and gains of business or profession”. Both these sections operate in different fields, the former is an enabling provision while the latter is a disabling provision. Therefore these decisions do not help the plea raised by the Assessee in this appeal.

26. The ld AR has quoted the following two decisions stating that there exists differentiation between the term ‘Tax’ used in 40(a)(ii) and ‘Other Contractual obligations’ parity of the same equally applies to differentiate the term ‘tax’ and expression ‘interest’ and to state that all the payments made to Government account would not partake the character of levy of taxes. We will first look at under what context these decisions have been rendered.

27. In *Kerala State Beverages Manufacturing & Marketing Corporation Ltd. Vs ACIT [2022] 134 taxmann.com 11 (SC)*, the decision is rendered by the Hon’ble supreme Court in the context of allowability of Gallonage fee, licence fee and shop rental (kist) incurred towards retail trading of foreign liquor and therefore in a completely different context that cannot be equated to assessee’s case.

28. In *Krishna Bhagya Jala Nigam Ltd vs ACIT [2022] 134 taxmann.com 101 (Bangalore - Trib.)* it was held that guarantee commission was paid in consideration for State Government agreeing to suffer a detriment in event of assessee not repaying loan guarantee commission was not in nature of a 'levy' on a State Government

undertaking by State Government and it was purely a contractual payment and did not fall within purview of section 40(a)(iib).

29. We have in the earlier part of this order already held that the question whether interest paid u/s.201(1A) of the Act is an allowable business expenditure has to be examined within the parameters of Sec.37(1) of the Act and not on the basis of the prohibition contained in Sec.40a(ii) of the Act. Sec.37(1) of the Act provides that expenditure which is not capital or personal in nature laid out or expended wholly and exclusively for the purpose of business shall be allowed in computing the income chargeable under the head "profits and gains of business or profession". Sec.40(ii) provides that any sum paid on account of any rate or tax levied on the profits and gains of any business or profession or assessed at a proportion of, or otherwise on the basis of any such profits or gains, shall not be deducted in computing the income chargeable under the head "profits and gains of business or profession". Both these sections operate in different fields, the former is an enabling provision while the latter is a disabling provision. Therefore these decisions do not help the plea raised by the Assessee in this appeal.

30. The ld AR also submitted that any sum paid referred in section 40(a)(ii) must be viewed from the perspective of only assessee whose payer and not from the payee perspective. The tax payment made on the profits earned by the assessee must not be enlarged to include even assessees vendor perspective. When TDS itself is not disallowed in the

payees hands interest so paid u/s. 201(1A) cannot be disallowed u/s.40(a)(ia). In our considered view, this contention of the ld AR is completely out of context, as we have already held that Sec.40(a)(ii) is not relevant to the present issue before us at all.

31. The ld AR relied on the following judgments to substantiate the claim that the interest u/s.201(1A) is compensatory in nature. The Hon'ble Supreme Court *CIT vs Eli Lilly & Co. (India) (P.) Ltd [2009] 312 ITR 225 (SC)* was rendered in the context of period up to which interest u/s.201(1A) is to be calculated and in that regard held that interest under section 201(1A) is a compensatory measure for withholding the tax which ought to have gone to the exchequer. The decision of Hon'ble Karnataka High Court in *CIT TDS vs Bharat Hotels Ltd [2015] 64 taxmann.com 325 (Karnataka)* was also rendered in the context of period interest calculation u/s.201(1A) and in that perspective held that "*Interest, herein, being compensatory in nature, cannot be, thus, charged for the period beyond the date when such tax has already been deposited by the recipient*". The decision in the case of *CIT vs Oriental Insurance Company Ltd., [2009] 183Taxman186 (Karnataka)*, the decision of the Tribunal holding that the interest u/s.201(1A) is penal in nature and cannot be levied was reversed by the Hon'ble Karnataka High Court to hold that levy of interest u/s.201(1A) cannot be construed as penalty and has to be paid for failure on the part of the assessee to deduct tax at source.

32. In all these judgments, the issue under consideration was the mode of computation of interest u/s.201(1A) and in that context, courts have held that it is compensatory in nature. In none of these decisions the issue of allowability of interest delayed payment of TDS as business expenditure arose and hence have no nexus to the assessee's case.

33. The ld AR relied on the following decisions to submit that compensatory payment should be allowed as a business expenditure u/s.37(1).

(i) P. Venganna Setty (2021) 133 taxmann.com 368 (Bang Trib)
(ii) Mandya National Paper Mills Ltd (1985) 20 Taxmann 231 (Karnataka)
(iii) Lachmandas Mathuradas (2002) 122 Taxmann 828 (SC)

34. The circumstance in which the interest u/s.201(1A) is held to be compensatory is discussed in the above paras and therefore the submission of allowability of interest u/s.201(1A) on that basis is not tenable. Besides the above, the law laid down by the Hon'ble Supreme Court in the case of *Bharat Commerce (supra)* in the context of allowability of interest as deduction u/s.37(1) of the Act, will be applicable in the present case.

35. The ld AR submitted that the words used in 40(a)(ii) 'tax levied on the profits' does not refer to interest paid on the TDS and that the when the language is clear and unambiguous literal interpretation of

the words must be made. In this regard the ld AR relied on the decision Exide Industries Ltd., (2020) 116 Taxmann.com 378 (SC). Further it was submitted that legislative *casus omissus* cannot be supplied by judicial interpretative process and relied on the following decisions in this context :-

(i) Ajmera Housing Corpn (2010) 193 Taxman 193 (SC)
(ii) Velliappa Textiles Ltd (2003) 132 taxman 165 (SC)
(iii) Babita Lila (2016) 73 taxmann.com 32 (SC)

36. In our considered view this contention of the ld AR is completely out of context as we have already held that Sec.40(a)(ii) is not relevant to the present issue before us at all. Moreover, the levy of interest on delayed payment of TDS u/s.201(1A) though held to compensatory in nature, the allowability of the same cannot be decided simply based on that. The levy of 201(1A) is a levy for delay in the remittance of tax that is deducted and not paid into the government account and is levied towards the use of funds belonging to the exchequer. The interest u/s.201(1A) can be equated to the levy of interest u/s.234. Interest u/s.234 is a levy on delay in the payment of income tax and the TDS is nothing but the income tax paid on behalf of the payee and therefore the interest on the same u/s.201(1A) is also in the nature of interest levied on the income tax. On that count also interest on delayed payment of TDS cannot be claimed as a deduction.

37. The ld AR quoted several decisions with regard to the allowability of cess which is not a settled position that cess is not an

allowable deduction and hence we are not going into the submissions made in this regard.

38. The next contention of the ld AR is that the 'tax' used in 40(a)(ii) is to be considered as the tax on the total income of the assessee himself. In our considered view this contention of the ld AR is completely out of context as we have already held that Sec.40(a)(ii) is not relevant to the present issue before us at all. Besides the above, the decision of the Madras High Court in the case of *Chennai Properties (supra)* settles the issue.

39. The ld AR submitted the decision of the Madras High Court in the case of *Standard Polygraph Machines (2002) 124 Taxman 669 (Madras)* stating that the same judge who authored the decision of *Chennai Properties (supra)* had in 2002 authored this decision where it was held that the TDS amount on paid on account of contractual obligation will not take colour of tax and hence to be treated as expenditure. This submission of ld AR is a complete misunderstanding of the facts of the case where the TDS is paid by the assessee as part of a contractual obligation over and above the contractual amount and therefore was treated as a business expenditure. This is interpreted out of context by the ld AR to state that TDS is not a tax but an obligation which in our view is illogical.

40. The ld AR submitted the below decisions of Tribunal where interest on delayed payment of TDS is allowed as a deduction. However following the *Doctrine of Stare Decisis*, we are bound by the

decision of Hon'ble High Court and therefore the below decisions cannot be followed in assessee's case

(i) Resolve salvage & Fire India (P) Ltd (2022) 139 taxmann.com 196 (Mum.Trib)
(ii) STUP Consultants Pvt Ltd (ITA No5827/Mum/2012 dt 11.12.2018
(iii) Narayani Ispat (P) Ltd (ITA 212/Kol/2014 dt 30.08.2017
(iv) Sai Food Products (ITA 1887/Kol/2016 dt 06.04.2018
(v) IDS Next Business Solutions (P) Ltd (ITA 510/Bang/2018 dt 15.06.2018
(vi) Rungta Mines Ltd (ITA 1531/Kol/217 dt 05.10.2018

41. Though there is a decision of the coordinate bench of the Tribunal, we have followed the decision of the Hon'ble High Court following the rule of judicial discipline as has been held in the case of *CIT v. Godavari Devi Saraf (113 ITR 589)* where the Hon'ble Bombay High Court has held that -

> "Until contrary decision is given by any other competent High Court, which is binding on a Tribunal in the State of Bombay, it has to proceed on the footing that the law declared by the High Court, though of another State, is the final law of the land."

42. The ld AR also made a submission drawing the comparison of the provisions of section 40(a)(ii) and section 179 to state that when terms are clearly defined by the Parliament, enlarging the scope of the section by importing the provisions from other parts of the Act is incorrect. In this regard the ld AR relied on the decision in the case of

HCL Technologies Ltd (2018) 93 taxmann.com 33 (SC). The ld AR failed to note the key distinction between these two sections. Section 179 is a provision for recovery from the directors of a private company and in that context the legislature has defined the word 'tax due' . As we have already held that Section 40(a)(ii) is not applicable to the present case at all, we are of the view that the contentions raised in this regard are untenable.

43. In the result, the appeal by the assessee is partly allowed.

44. The appeal having been disposed, the stay petition filed by the assessee in SP No.31/Bang/2022 has become infructuous and dismissed as such.

Pronounced in the open court on this 1st day of August, 2022.

Sd/-	Sd/-
(N V VASUDEVAN)	(PADMAVATHY S)
VICE PRESIDENT	ACCOUNTANT MEMBER

Bangalore,
Dated, the 1st August, 2022.
/Desai S Murthy /

Copy to:
1. Appellant 2. Respondent 3. CIT 4. CIT(A)
5. DR, ITAT, Bangalore.

By order

Assistant Registrar
ITAT, Bangalore.