

**IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH : BANGALORE**

**BEFORE SHRI. CHANDRA POOJARI, ACCOUNTANT MEMBER
AND
SMT. BEENA PILLAI, JUDICIAL MEMBER**

ITA Nos. 45 & 46/Bang/2017
Assessment Years : 2010-11 & 2011-12

M/s. Total Environment Building Systems Pvt. Ltd., 'Imagine', No. 78, ITPL Main Road, EPIP Zone, Whitefield, Bangalore – 560 066. PAN: AABCT9452F	Vs.	The Deputy Commissioner of Income Tax, Circle – 7 (1)(1), Bangalore.
APPELLANT		RESPONDENT

**&
ITA No. 40/Bang/2017
Assessment Year : 2010-11
(By Revenue)**

Assessee by	:	Smt. Tanmayee Rajkumar, Advocate
Revenue by	:	Shri Vilas V Shinde, CIT DR

Date of Hearing	:	29-06-2022
Date of Pronouncement	:	29-06-2022

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER

Present appeals are filed by assessee as well as revenue for assessment year 2010-11 and appeal filed by assessee for assessment year 2011-12 arising out of separate order dated 07/10/2016 passed by the Ld.CIT(A)-7, Bangalore respectively.

Following are the grounds of appeal raised by the assessee well as revenue for assessment year 2010-11:

ITA No. 40/Bang/2017 (Revenue's appeal)

"1. The order of the learned CIT(A) is opposed to law and facts of the case.

2. "The Ld. CIT(A) has erred in ignoring the fact that, assessee had not offered for tax entire advances received for maintenance (which was governed by separate agreement between the assessee company and the flat owner) on which service tax was also collected during the year".

3. "The Ld. CIT(A) has erred in allowing the Maintenance Advance received for being taxed in respective assessment years ignoring the decision of the Hon'ble Supreme Court in the case of Sundaram Finance Limited vs. ACIT (2012) 349 ITR 356".

4. For these and other grounds that may be urged at the time of hearing, it is prayed that the order of the CIT(A) in so far as it relates to the above grounds may be reversed and that of the Assessing Officer may be restored.

5. The appellant craves leave to add, alter, amend and/or delete any of the grounds mentioned above."

ITA No. 45/Bang/2017 (Assessee's appeal) – A.Y. 2010-11

"Based on the facts and circumstances of the case and in law. Total Environment Building Systems Private Limited (hereinafter referred to as "Appellant"), respectfully craves leave to prefer an appeal against the appeal order passed by the learned Commissioner of Income-Tax (Appeals) — 7 [hereinafter referred to as the "learned CIT (A)-] under section 250 of the Income-tax Act, 1961 ("Act") on the following grounds:

That on the facts and circumstances of the case and in law:

1. That the learned CIT (A) has erred in law and on facts in upholding the order of the AO.

2. The learned CIT (A) has erred in law and on facts in directing the learned AO for treating the advance of INR 11,06.79.804 towards maintenance as income of the Assessee Company in the year of expenditure.

3. The learned CIT(A) has erred in law and on facts, by upholding the action of the learned Assessing Officer ("learned AO-) in making an

addition of INR 1,22,43,872 on account of unpaid service tax liability under section 43B of the Act.

4. The learned CIT (A) has erred by upholding the action of the AO of making an addition of INR 50,00,000 in respect of sales tax liability provided and paid during the year under consideration.

5. The learned AO/CIT (A) has failed to appreciate that the above service tax liability has been paid before the due date of filing the return of income for the relevant year and therefore allowable under section 43B of the Act.

6. The CIT (A) has erred in upholding the addition made by the AO on account of interest paid towards late payment of TDS INR 10,78,199 as penal in nature.

7. The learned CIT (A) has failed to appreciate that the interest on account of late payment of TDS is not penal in nature and therefore allowable under section 37 of the Act.

8. The CIT (A) has erred in law and on fact, by upholding the addition made by the AO of INR 1,77,912 in respect of interest payments to certain Non-Banking Financial Concerns.

9. The learned CIT(A) has erred in law and fact by confirming the addition on account of claim of depreciation of INR 19,98,058 on account of non-deduction of tax at source in relation to computer software purchased under section 40(a)(ia) of the Act.

10. The CIT (A) has failed to appreciate that the claim of depreciation is towards recoupment of the value of the asset and not an expenditure.

11. The learned CIT (A) has erred in law in confirming the addition of INR 8,59,111 made by the AO insofar as the contribution made towards Superannuation Fund.

12. The learned CIT(A) has erred in law and fact, by upholding the action of the AO in disallowing the proportionate interest of INR 16,10,960 attributable to the borrowed money diverted for payment of advance tax purpose.

13. The learned CIT (A) has failed to appreciate that there was no diversion of borrowed money and the borrowed money has been fully utilised wholly and exclusively for the purpose of business.

The Appellant submits that each of the above grounds is independent and without prejudice to one another.

The Appellant craves leave to add, alter, amend, vary, omit or substitute any of the aforesaid grounds of appeal at any time before or at the time of hearing of the appeal, so as to enable the Hon'ble Tribunal to decide on the appeal in accordance with the law."

2. Following on the grounds raised by the assessee for assessment year 2011-12:

"Based on the facts and circumstances of the case and in law, Total Environment Building Systems Private Limited (hereinafter referred to as "Appellant"). respectfully craves leave to prefer an appeal against the appeal order passed by the learned Commissioner of Income-Tax (Appeals) — 7 [hereinafter referred to as the "learned CIT (A)"] under section 250 of the Income-tax Act, 1961 (-Act") on the following grounds:

That on the facts and circumstances of the case and in law:

1. That the learned CIT (A) has erred in law and on facts in upholding the order of the learned AO.

2. The learned CIT (A) has erred in law and on facts in directing the learned AO for treating the advance of INR 1,21,91,479 towards maintenance as income of the Assessee Company in the year of expenditure.

3. The learned CIT(A) has erred in law and on facts in upholding the disallowance of an amount of INR 48,45,096 under section 14A of the Act, read with Rule 8D of the Income Tax Rules.

4. The learned CIT (A) has failed to appreciate that there was no expenditure incurred by the Appellant in respect of dividend income of INR 82.410 earned during the year.

5. The learned CIT (A) has erred in law and on facts in applying computation provisions of Rule 8D without recording dissatisfaction about the correctness of the Appellant's claim that no expenditure has been incurred towards earning the exempt income.

6. The learned CIT (A) has erred in law in confirming the addition of INR 9, 03.956 made by the AO insofar as the contribution made towards Superannuation Fund.

7. The learned CIT(A) has erred, in law and on facts by confirming the addition made by the AO on account of claim of depreciation of INR 6,00,000 on account of non-deduction of tax at source in relation to computer software purchased under section 40(a)(ia)

8. The learned CIT(A) has failed to appreciate that the provisions of Section 40(a)(ia) is not applicable to claim of depreciation as it not an

expenditure incurred thus erred in confirming the addition made by the learned AO.

The Appellant submits that each of the above grounds is independent and without prejudice to one another.

The Appellant craves leave to add, alter, amend, vary, omit or substitute any of the aforesaid grounds of appeal at any time before or at the time of hearing of the appeal, so as to enable the Hon'ble Tribunal to decide on the appeal in accordance with the law."

Assessment year 2011-12:

3. Brief facts of the case are as under:

3.1 The assessee is engaged in the development of various residential project. It is engaged in the activities of construction, development, sale, management and operation of housing projects. It also undertake maintenance of project developed by them. For a year under consideration, it filed its return of income on 27/09/2011 declaring total income of ₹ 16,63,25,758/-. The case was selected for scrutiny and notice under section 143(2) and 142(1) of the Act, was issued to assessee, in response to which representative of assessee appeared before the Ld.AO and filed requisite details as called for. The Ld.AO noted that, the assessee disclosed its income from construction projects by following percentage completion method of accounting. The Ld.AO noted that, the assessee received consideration under various heads like land cost, construction cost, customisation cost, car parking, eBay, architect fee, maintenance etc., however for the purpose of arriving at the sale to be booked on the basis of percentage completion of project, the assessee omitted to consider consideration received under the head maintenance.

3.2 The Ld.AO noted that the assessee disclosed only ₹ 1,22,32,859/-as maintenance income on completed project

whereas it claimed the sum of ₹ 1,21,85,392/- as maintenance expenses on completed projects and claimed the same as expenditure by way of debiting it to the P&L account. The Ld.AO accordingly called upon assessee to furnish relevant details in respect of the same.

3.3 The Ld.AO to after considering the submissions of the assessee relied on the assessment order passed for assessment year 2010-11, wherein, similar issue was examined and the assessing officer therein concluded that, the maintenance advance received by the assessee should also be considered for the purpose of determining income on the basis of percentage completion method of accounting. The Ld.AO thus, for the year under consideration made an addition of ₹ 1,21,91,479/- in the hands of assessee.

3.4 The Ld.AO then observed that assessee had disclosed ₹ 22,34,328/- as long-term capital gain on sale of land whereas the sale consideration was shown at ₹ 22 crores and the index cost of acquisition was declared at ₹ 21,43,90,372/- against which ₹ 33,75,000/- was claimed as expenditure. The Ld.AO called upon the assessee and on verification of the details, was of the opinion that, ₹ 5 lakh was claimed towards compensation made to the buyers of the land and not for clearing the shrubs etc., and levelling the entire land area which was disallowed by the Ld.AO.

3.5 The Ld.AO then observed that, the assessee claimed sum of ₹ 9,03,956/- being contribution made towards superannuation fund and debited the same to under the personal expenditure. The Ld.AO disallowed the expenditure by holding that, the

superannuation fund was not an approved fund as the assessee could not furnish relevant information in respect of the same.

3.6 The Ld.AO observed that, during the year under consideration the assessee had made investment in shares and mutual fund and the dividend income received from these investments were not included in the taxable income and was claimed exempt under section 10(34) of the Act. The Ld.AO thus made disallowance of ₹ 48,45,096/- by considering the average value of investment.

3.7 The Ld.AO observed that assessee had purchased certain software is an capitalised ₹ 20,90,000/-. The Ld.AR noted that, the assessee did not make TDS on ₹ 10,90,000/- under section 194J of the Act. The Ld.AO therefore disallowed ₹ 6 lakh under section 40(a)(ia) of the Act.

3.8 Aggrieved by the additions made, assessee preferred appeal before the Ld.CIT(A).

3.9 The Ld.CIT(A) in the impugned order partly allowed the appeal by granting relief in respect of the disallowance made towards a long-term capital gain.

3.10 Aggrieved by the order of the Ld.CIT(A), the assessee as well as revenue are an appeal before the *Tribunal*.

4. Revenue is in appeal for AY:2010-11 on only one issue being the treatment of maintenance advance in the hands of the assessee.

5. Ground No.2 in assessee appeal and Ground No.2-3 in revenue for appeal are in respect of taxability of maintenance advance in the hands of assessee.

5.1 It is submitted that this issue arises in assess's appeal for AY 2011-12, and revenue has not raked up any issue for ay 2011-12. Both sides submitted that facts are identical and therefore we are considering this issue for both the years under consideration. It is submitted that, the revenue in its appeal is aggrieved with the order of Ld.CIT(A), wherein the Ld.CIT(A) accepted the contentions of assessee by observing that the accounting treatment given for advance does not have much relevance as it depends on the income tax liability of a person depending on its nature of business and objects. The Ld.CIT(A) further directed the Ld.AO to compute the amount of expenditure incurred out of the maintenance advance received and then bring it to tax to which revenue is aggrieved.

5.2 On the contrary the Ld.AR submitted that, having held that assessee cannot be taxed on the entire maintenance advance received, partly allowed the issue. To this extent the assessee is aggrieved.

5.3 We have perused the submissions advanced by both sides in light of records placed before us.

5.4 Admittedly, the assessee received advances from the customers at the time of handing over of the possession of apartments, which is accounted as current liabilities in its balance sheets. It is submitted that, as and when the maintenance services are rendered, the assessee raises invoices on the resident association owners on a pre-agreed pricing model, and for the same tax in that year after deducting the expenses for rendering such services is paid. It is submitted by the Ld.AR that, the assessee has not received the entire sum of ₹ 11,06,79,804/-

for the year under consideration and ₹ 1,21,91,479/- for assessment year 2011-12 as observed by the Ld.AO.

5.5 She also submitted that the decision of *Hon'ble Supreme Court* in case of *Sundaram Finance Ltd vs. CIT*, reported in (2012) 349 ITR 356 referred and relied by the Ld.AO, is on different facts and is not applicable to the present facts of the case. The Ld.AR placed reliance on following decisions in support of her contentions that, the assessee correctly recognised the income over the period of provision of services:

- *CIT v. Punjab Tractors Co-op. Multipurpose Society Ltd. reported in [1997] 95 Taxman 579 (punj. & Har.)*
- *CIT v. Coral Electronics (P.) Ltd. reported in [2005] 142 Taxman 481 (Mad.)*
- *CIT v. Shankaranarayan Construction Co. reported in [1993] 68 Taxman 426 (Kar.)*

5.6 She also submitted that, in any event the addition on the basis of project maintenance advance receivable cannot be sustained as they are hypothetical income, which the assessee had not received during the years under consideration. She submitted that the figures consideration were only projections filed by the assessee at the instance of the Ld.AO during the assessment proceedings for relevant years.

5.7 We note that the Ld.CIT(A) expressed categorical view that, advances do not partake the character of income and that the maintenance advances received by a sissy cannot be characterised as income unless the maintenance services are rendered. We note that the Ld.CIT(A) rightly directed the Ld.AO to compute the amount of expenditure incurred out of the search total advances received for the year under consideration which is based on percentage completion method.

5.8 On perusal of the totality of facts and observations of the Ld. CIT(A), based on various judicial precedents relied by the Ld.AR, we are of the view that the direction issued by the Ld.CIT(A) to the Ld.AO is in accordance with law and cannot be found fault with. We also agree with the submissions of the Ld.AR that, the decision relied by the Ld.AO in case of *Sundaram Finance Ltd vs. ACIT (supra)* are rendered on different facts and are distinguishable with that of assessee in the present case.

5.9 We accordingly direct the Ld.AO to compute the maintenance attributable for the years under consideration based on the expenditure incurred and the services rendered by the assessee.

Accordingly, for AY 2010-11, Ground No.2 raised by assessee stands allowed and Ground No.2-3 raised by revenue stands dismissed. For AY 2011-12, Ground no.2 stands allowed.

6. Ground No.3 raised by assessee in respect of addition made by the Ld.AO on account of unpaid service tax liability of ₹ 1,22,43,872/-.

6.1 It is the submission of the Ld.AR that the assessee collected amount from its customers, towards service tax liability, however the same was not remitted. It is submitted that the assessee was relying on the circular issued by the Central Board of Excise and Customs exempting service tax on cost construction projects.

6.2 The Ld.AO made addition invoking section 43B of the Act, relying on the decision of *Sunroom Finance supra*.

6.3 On an appeal before the Ld. CIT(A) the disallowance was upheld.

6.4 Before us, the Ld.AR submitted that, the unpaid service tax liability is not debited to the P&L account, but, instead is

retained as part of current liabilities in the balance sheet. She submitted that, the assessee did not claim the deduction in respect of such amounts collected, and therefore section 43B is not applicable. The Ld.AR submitted that in *Sundaram Finance* case (supra), amount was retained by assessee therein and was also credited to the P&L account. She submitted that, therefore was of income character whereas in the present case the amount reflected as a liability either to be paid to the service tax department or refunded to the customers and therefore cannot be disallowed under section 43B.

6.5 On the contrary the Ld.DR relied on the decision of *Hon'ble Supreme Court* in case of *Chowranghee sales Buro vs. CIT*, reported in (1973) 87 ITR 542

6.6 We have perused submissions advanced for both sides in light of records placed before us.

6.7 Section 43B does not contemplate liability to pay the service tax before actual receipt of the funds in the account of the assessee. In our opinion, when the assessee collected the amount, it should not kept it with them and same should be deposited to the Government exchequer within the specified date and time. *Hon'ble Court* in *Chowringhee Sales Bureau (P.) Ltd. v. CIT(supra)* held that, the amount realised on sales tax by the assessee in his character as an auctioneer formed part of its trading or business receipts. *Hon'ble Court*, in this case, was considering similar situation wherein sales tax collected by the assessee therein was not deposited to the Government account. *Hon'ble Supreme Court* held that, the fact that assessee credited

the amount received as sales tax under the head "sales tax collection account" did not make any material difference.

6.8 However, we note that in the event the liability stood discharged by the assessee before filing of the return of income, a liberal view can be adopted in view of the decision of *Coordinate Bench of this Tribunal* in case of *The Continental Restaurant & Café Co. v. ITO* in *ITA No.388/Bang/2021 vide order dated 11.10.2021*.

The relevant finding of the Tribunal reads as follows:-

"7. I have heard rival submissions and perused the material on record. Admittedly, the assessee has not remitted the employees' contribution of PF of Rs.1,06,190 and ESI of Rs.16,055 totaling to Rs.1,22,245 before the due date specified under the respective Act. However, the assessee had paid the same before the due date of filing of the 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 PF and 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.). In holding so, the Hon'ble High Court was considering following substantial question of law:-

"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?"

7.1 In deciding the above substantial question of law, the Hon'ble High Court rendered the following findings:-

"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.

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.*

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.*

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 I.T.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 of PF and 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 I.T.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 to section 36(1)(va) and 43B of the I.T.Act by Finance Act, 2021 will not have application for the relevant assessment year, namely A.Y. 2019-2020. Accordingly, I direct the A.O. to grant deduction in respect of employees' contribution to PF and 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. In the result, the appeal filed by the assessee is allowed."

6.9 We also note that *Hon'ble jurisdictional High Court* in case of *Essae Taroka (P.) Ltd.* reported in (2014) 266 CTR 246 and *Spectrum Consultants India (P.) Ltd.* reported in (2013) 266 CTR 94 has affirmed the above view.

6.10 We therefore remand this issue to the Ld.AO, to verify and consider the claim in accordance with the principles laid down in case of *Essae Taroka (P.) Ltd.(supra)*.

Accordingly this ground raised by the assessee stands allowed for statistical purpose.

7. Ground no.4-5 for AY 2010-11 and Additional Ground raised in AY 2011-12 is in respect of disallowance made in respect of the sales tax liability discharged.

7.1 Assessee has raised additional ground for assessment year 2011-12 vide application dated 22/06/2022 wherein following issue is sought to be admitted:

"9. Without prejudice to the ground raised in the assessment year 2010-11, in the event the Appellant's claim in the assessment year 2010-11 for deduction of Rs. 50,00,000/- being sales tax demand paid is denied, the same ought to be allowed in the assessment year 2011-12, since the demand was raised during the assessment year 2011-12 and was paid in the said year".

7.2 We note that no new documents needs to be verified for adjudicating this ground and respectfully following the decisions of *Hon'ble Supreme Court* in case of *National Thermal Power Co. Ltd. Vs. CIT* reported in (1998) 229 ITR 383 and *Jute Corporation of India Ltd. Vs. CIT* reported in 187 ITR 688, we are admitting the additional ground raised by the assessee.

Accordingly, the application for raising additional ground stands allowed for the year under consideration.

Accordingly additional ground raised by assessee vide application dated 22.06.2022 stands admitted.

8. The assessee received a sales tax assessment order and a notice of demand dated 17.06.2010 raising a demand of Rs.50,00,000/- pertaining the sales tax periods April 2008 to October 2008 and paid the same. Since the payment of the demand was made before the due date for filing the return for AY 2010-11, the same was claimed as a deduction for AY 2010-11 by the assessee.

9. The AO disallowed the same holding that since the demand pertains to AY 2009-10, the same could not be allowed in AY 2010-11. The CIT(A) upheld the same holding that the liability arose in AY 2011-12 and therefore could not allowed for AY 2010-11.

10. The Ld.AR submitted that assessee received the sales tax assessment order and a notice of demand of ₹ 50 lakhs pertaining to sales tax. April 2008 to October 2008. The assessee paid the same before the due date of filing of the return of Income vide 2010-11 and claimed it as a deduction for a wide 2010-11.

11. The Ld.AO disallowed the same by holding that, since the demand pertains to a white 2009-10 the same could not be considered for assessment A 2010-11 which was upheld by the Ld. CIT(A).

12. The Ld.AR before us, submitted that, the notice of demand was issued on 17/06/2010 that is relevant to assessment A 2011-12 and the payment was made in assessment year 2011-12. She submitted that assessee has raised an additional ground

in respect of the same for assessment A 2011-12 and that the same may be considered in that year.

13. The Ld.DR on the contrary relied on orders passed by authorities below.

14. We have perused the submissions advanced by both sides in light of records placed before us.

15. We note that the demand notice was received by the assessee during financial year relevant to the assessment year 2011-12, and the assessee discharged the liability during assessment year 2011-12. We therefore agree with the submissions of the Ld.AR that the disallowance is to be deleted for AY 2011-12 as per the additional ground raised by the assessee in appeal filed for AY 2011-12.

Accordingly ground no.4-5 for AY 2010-11 stands dismissed and Additional ground raised for AY 2011-12 stands allowed.

16. Ground no.6-7 is in respect of disallowance of interest under section 201(1A) by treating it to be penal in nature.

16.1 It is submitted that the interest under section 201(1A) is not penal but is compensatory. It also does not represent tax of the assessee as it pertains to the tax liability of a third party. Reliance is placed on *Resolve Salvage & Fire India (P.) Ltd. v. DCIT* reported in [2022] 139 taxmann.com 196 (Mumbai-Trib.)

*“5. Considered the rival submissions and materials placed on record. We observe that assessee has paid interest on late payment of TDS. We observe from various decisions relied upon by both the parties and we observe that Ld.CIT(A) has relied upon the decision of Ferro Alloys Corpn. (supra) in which the Hon'ble High Court has not discussed anything on merit considering the fact that the case *Bharat Commerce Industries Ltd. v. CIT* 11985] 20 Taxman 302/153 ITR 275 was pending before Hon'ble Supreme Court and we observe that even in the case of*

Bharat Commerce Industries Ltd, the issue involved is relating to interest paid on late payment of advance-tax. Therefore, the issue involved in the present case is not relating to late remittance of advance-tax but late remittance of TDS. Therefore, the issue involved is whether the interest paid by the assessee to the government can be termed as compensatory or penal in nature. In our considered view, the assessee has deducted the tax on behalf of the third party and failed to remit the same within the due date and the interest charged on such amount is only compensatory in nature. Here we notice that the co-ordinate bench of this Tribunal has already held the same view in the case of STUP Consultants (P.) Ltd. (supra) by observing as under :—

'7. We have heard the rival contentions of both the parties and perused the material available on record. In the instant case, AO has disallowed the interest expenses incurred by the assessee on account of late deposit of service tax and TDS after having reliance on the judgment of Hon'ble Supreme Court in the case of Bharat Commerce Industries Ltd. v. CIT (1998) (supra). The relevant extract of the judgment reads as under :—

FACTS

During the year under consideration, the assessee failed to pay advance tax equivalent to 75 per cent of estimated tax. The Assessing Officer levied section 215 as well as under section 139. The assessee claimed that were payable were delayed, the assessee's financial resources increased available for business purposes. Hence, the interest which was paid Government was interest on capital that would be borrowed by the assessee otherwise. Hence, the amounts should be allowed as deduction. The allow such deduction. The High Court affirmed the view. On appeal to the Supreme Court: HELD

When interest is paid for committing a default in respect of a statutory liability 10 advance tax, the amount paid and the expenditure incurred in that connection is in no way connected with preserving or promoting the business of the assessee. This is not expenditure which is incurred and which has to be taken into account before the profits of the business are calculated. The liability in the case of payment of income-tax and interest for delayed payment of income-tax or advance tax arises on the computation of the profits and gains of business. The tax which is payable is on the assessee's income after the income is determined. This cannot, therefore, be considered as an expenditure for the purpose of earning any income or profits. Interest which is paid for delayed payment of advance tax on such income cannot be considered as expenditure wholly and

exclusively for the purpose of business. Under the Act, the payment of such interest is inextricably connected with the assessee's tax liability. If income-tax itself is not permissible deduction under section 37, any interest payable for default committed by the assessee in discharging his statutory obligation under the Act, which is calculated with reference to the tax on income, cannot be allowed as a deduction.

Therefore, it was to be held that deduction of interest levied under sections 139 and 215 would not be allowable under section 37.

In the above judgment, the claim of the assessee for interest expenses was denied as it defaulted to make the payment of advance tax as per the provisions of the Act. The advance tax is nothing but income tax only which the assessee has to pay on his income. In the instant case the default relates to the delay in the payment of advance tax and consequently interest was charged on the delayed payment of advance tax. In the above judgment the Hon'ble Apex Court held that as Income-tax paid by the assessee is not allowable deduction and therefore interest emanating from the delayed payment of income tax (advance tax) is also not allowable deduction.

However the facts of the instant case before us are distinguishable as in the case before us the interest was paid for delayed payment of service tax & TDS. The interest for the delay in making the payment of service tax & TDS is compensatory in nature. As such the interest on delayed payment is not in the nature of penalty in the instant case on hand.

The issue of delay in the payment of service tax is directly covered by the judgment of Hon'ble Apex Court in the case of Lachmandas Mathura v. CIT reported in 254 ITR 799 in favour of assessee. The relevant extract of the judgment is reproduced below :

"The High Court has proceeded on the basis that the interest on arrears of sales tax is penal in nature and has rejected the contention of the assessee that it is compensatory in nature. In taking the said view the High Court has placed reliance on its Full Bench's decision in Saraya Sugar Mills (P.) Ltd. v. CIT 11979] 116 TTR 387 (All.) The learned counsel appearing for the appellant-assessee states that the said judgment of the Full Bench has been reversed by the larger Bench of the High Court in Triveni Engg. Works Ltd. v. CIT 119831 144 ITR 732 (All.) (FB) wherein it has been held that interest on arrears of tax is compensatory in nature and not penal. This question has also been considered by this Court in Civil Appeal No. 830 of 1979 titled Saraya Sugar Mills (P.) Ltd. v. CIT

decided on 29-2-1996. In that view of the matter, the appeal is allowed and question Nos. 1 and 2 are answered in favour of the assessee and against the revenue."

In view of the above judgment, there remains no doubt that the interest expense on the delayed payment of service tax is allowable deduction.

The above principles can be applied to the interest expenses levied on account of delayed payment of TDS as it relates to the expenses claimed by the assessee which are subject to the TDS provisions. The assessee claims the specified expenses of certain amount in its profit & loss account and thereafter the assessee from the payment to the party deducts certain percentage as specified under the Act as TDS and pays to the Government Exchequer. The amount of TDS represents the amount of income tax of the party on whose behalf the payment was deducted & paid to the Government Exchequer. Thus the TDS amount does not represent the tax of the assessee but it is the tax of the party which has been paid by the assessee. Thus any delay in the payment of TDS by the assessee cannot be linked to the income tax of the assessee and consequently the principles laid down by the Hon'ble Apex Court in the case of Bharat Commerce Industries Ltd. v. CIT (1998) reported in 230 ITR 733 cannot be applied to the case on hand.'

6. Being consistent with the above decision of the coordinate bench, we hold that the interest paid on delayed payment of TDS u/s 201(1A) is an allowable deduction.

We direct accordingly. Assessee succeeds in its appeal."

16.2 Respectfully following the same we direct the Ld.AO to delete the disallowance made.

Accordingly these grounds raised by the assessee stands allowed.

17. Ground no.8 is in respect of disallowance of interest paid to the NBFC under section 40(a)(i).

17.1 The Ld.AR submitted that though the assessee did not deduct taxes at source on the interest paid to NBFCs, it is submitted that where the payee has paid the taxes directly, no disallowance under section 40(a) would be warranted. Reliance is placed on CIT v. Sahara India Commercial Corpn. Ltd. Reported

in [2017] 88 taxmann.com 719 (Allahabad) where it was held that where the payee had paid the taxes, the assessee could not be treated as an assessee in default under section 201 of the Act.

17.2 Based on the above we remand to the Ld.AO to verify if the payee has paid the taxes on the interest component paid by the assessee. If the submission is found to be correct, the disallowance is directed to be deleted.

Accordingly this ground raised by the assessee stands allowed for statistical purposes.

18. Ground no.9-10 for AY 2010-11 & Ground No.2011-12 for AY 2011-12 are in respect of disallowance of depreciation on computer software for non deduction of TDS under section 40(a)(ia) of the Act.

18.1 This issue is covered in favour of assessee by the decision of *Hon'ble Karnataka High Court* in case of *PCIT vs.Tally Solutions (P.) Ltd* reported in (2021) 123 taxmann.com 21. Hon'ble Court held as under:

9. We have considered the submissions made by learned counsel for the parties and have perused the record. Before proceeding further, it is apposite to take note of relevant extract of section 40 of the Act, which is reproduced below for the facility of reference:

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—

(ia) thirty per cent of any sum payable to a resident], 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, thirty per cent of such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid :

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

Explanation.—For the purposes of this sub-clause,—

(i)**

**

**

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

10. *Thus, from close scrutiny of section 40(a)(i) of the Act, it is axiomatic that an amount payable towards interest, royalty, fee for technical services or other sums chargeable under this Act shall not be deducted while computing the income under the head profit and gain of business or profession on which tax is deductible at source; but such tax has not been deducted. The expression 'amount payable' which is otherwise an allowable deduction refers to the expenditure incurred for the purpose of business of the assessee and therefore, the said expenditure is a deductible claim. Thus, section 40 refers to the outgoing amount chargeable under this at and subject to TDS under Chapter XVII-B. The deduction under section 32 is not in respect of the amount paid or payable which is subjected to TDS; but is a statutory deduction on an asset which is otherwise eligible for deduction of depreciation. Section 40(a)(i) and (ia) of the Act provides for disallowance only in respect of expenditure, which is revenue in nature, therefore, the provision does not apply to a case of the assessee whose claim is for depreciation, which is not in the nature of expenditure but an allowance. The depreciation is not an outgoing expenditure and therefore, provisions of Section 40(a)(1) and (ia) of the Act are not applicable. In the absence of any requirement of law for making deduction of tax out of expenditure, which has been capitalized and no amount was claimed as revenue expenditure, no disallowance under section 40(a)(i) and (ia) of the Act would be made. It is also pertinent to note that depreciation is a statutory deduction available to the assessee on a asset, which is wholly or partly owned by the assessee and used for business or profession. The depreciation is an allowance and not an expenditure, loss or trading liability. The Commissioner of Income Tax (Appeals) has held that the payment has been made by the assessee for an outright purchase of Intellectual Property Rights and not towards royalty and therefore, the provision of section 40(a)(ia) of the Act is not attracted in*

respect of a claim for depreciation. The aforesaid finding has rightly been affirmed by the tribunal. The findings recorded by the Commissioner of Income Tax (Appeals) as well as the tribunal cannot be termed as perverse.

Accordingly, this ground raised by assessee stands allowed.

19. Ground No. 11 for AY 2010-11 & Ground No.6 for AY 2011-12 is against disallowance of contributions made towards superannuation fund by the assessee.

19.1 The AO disallowed the contribution made to superannuation fund on the ground that the approval for the same had not been received, while noting that as and when the CIT accords approval, the assessee could claim the deduction.

19.2 The assessee, vide its application for additional evidence dated 28.06.2022, has submitted the following documents:

1. Application dated 27.02.2008 seeking approval of the new superannuation fund under Part B of the Fourth Schedule to the Income tax Act, 1961.
2. Letter dated 17.02.2017 seeking approval of the new superannuation fund in furtherance to the earlier letter dated 27.02.2008.
3. Approval vide order dated 18.09.2017 passed by the Principal Commissioner of Income-tax.

19.3 We have perused the submissions advanced by both sides in the light of records placed before us.

19.4 We note that the assessee had applied for approval of the fund as on 27/02/2008. The Ld.AR prays for the issues to be remanded to the Ld.AO for due consideration of the approval dated 18.09.2017. The Ld.DR did not object for the submission made by the Ld.AR.

19.5 We are therefore remanding this issue back to the Ld.AO with a direction to consider the approval dated 18/09/2017, in accordance with law.

Accordingly, this ground raised by the assessee stands allowed for statistical purposes.

Accordingly, this ground raised by assessee stands allowed for AY 2010-11 & 2011-12.

20. Ground no.12-13 for AY 2010-11 is in respect of disallowance of interest on borrowed funds.

20.1 It is submitted that the AO's observation that there has been a diversion of loan funds for payment of advance tax is without any basis as he has not established the nexus between the loans received and the payment of advance tax. It is submitted that the borrowed funds were fully utilised for the purpose of the business of the assessee and therefore, no addition is warranted.

21. Ground no. 3-5 for AY 2011-12 in respect of disallowance under section 14 A.

21.1 It is submitted that the assessee had received dividend of Rs.82,410/- during the year. Applying Rule 8D(2)(iii), the Assessing Officer made a disallowance of Rs. 48,45,096/-.

21.2 We have perused the submissions advanced by both sides in the light of records placed before us.

21.3 The assessee made the submissions and after considering the submissions of the assessee, AO by invoking the provision of Rule 8D worked out the disallowance u/s 14A of the Act. The alternate submissions of the Ld.AR in working disallowance u/s 14A by considering the investment which have yielded tax free income is concerned, we find force in the submission of Ld.AR. We find that decision of *Hon'ble Delhi High Court* in case of *CIT vs. Holcim India Pvt. Ltd.* reported in

(2014) 90 CCH 81, Hon'ble Gujarat High Court in the case of CIT vs. Corrtch Engineering Pvt. Ltd. reported in 372 ITR 97 and decision of Hon'ble Allahabad High Court in case of CIT v. Shivam Motors (P.) Ltd. reported in (2015) 230 Taxman 63 has held that Section 14A of the Act, cannot be involved when no exempt income was earned. The contention of the assessee that, it received dividend only from certain investments has not been controverted by the revenue. In such a situation, relying on the aforesaid decisions, we are of the view that disallowance u/s 14A needs to be re-worked on the basis of the investments which have yielded tax free income. We therefore direct the Ld.AO to work out disallowance u/s.14A r.w.r 8D on the basis of investments which had yielded dividend.

Accordingly, this ground raised by the assessee stands partly allowed.

In the result, revenue's appeal stands dismissed and the assessee's appeals for A.Ys. 2010-11 and 2011-12 stands partly allowed.

Order pronounced in the open court on 29th June, 2022.

Sd/-
(CHANDRA POOJARI)
Accountant Member

Sd/-
(BEENA PILLAI)
Judicial Member

Bangalore,
Dated, the 29th June, 2022.
/MS /

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore
6. Guard file

By order

Assistant Registrar,
ITAT, Bangalore