आयकर अपीलीय अधिकरण, कोलकाता पीठ 'सी', कोलकाता

IN THE INCOME TAX APPELLATE TRIBUNAL "C"BENCH KOLKATA

श्री संजय गर्ग, न्यायिक सदस्य एवं श्री गिरीश अग्रवाल, लेखा सदस्य के समक्ष

Before Shri Sanjay Garg, Judicial Member and Shri Girish Agrawal, Accountant Member

I.T.A. No.387/Kol/2021
Assessment Year: 2014-15

M/s Premier Irrigation Adritec (P) Ltd.…..….....…..……Appellant
17/1C, Alipore Road, Niharika,
Kolkata-700027.
[PAN: AAFCM4800Q]

vs.

ACIT, Circle-11(1), Kolkata...…..……...…….....…...…..…..…..... Respondent

Appearances by:
Shri A. K. Tibrewal, FCA, appeared on behalf of the appellant.
Smt. Ranu Biswas, Addl. CIT-DR, appeared on behalf of the Respondent.

Date of concluding the hearing :November 21, 2022
Date of pronouncing the order :January 20,2023

आदेश / ORDER

संजय गर्ग, न्यायिक सदस्य द्वारा/ Per Sanjay Garg, Judicial Member:

The present appeal has been preferred by the assessee against the order dated 30.07.2021 of the National Faceless Appeal Centre [hereinafter referred to as 'CIT(A)'] passed u/s 250 of the Income Tax Act (hereinafter referred to as the 'Act').

2. The assessee, in this appeal, has taken the following grounds of appeal:

> *"1. That the Leaned Commissioner of Income Tax (Appeals) erred in confirming the addition of Rs.10,10,774 made by the Assessing Officer invoking the provisions of section 43B of the Income Tax Act, 1961 read with sections 2(24)(x) and 36(1)(va) for the alleged delay in depositing the Employees Contribution to Provident Fund and Employees State Insurance under the relevant Act but deposited before the due date of furnishing the return of income.*

2 That the Learned Commissioner of Income Tax (Appeals) erred in confirming the addition of Rs.10,10,774 relying on the amendments made in relevant provisions by Finance Act 2021 although the amendments are prospective and does not apply to the Assessment Year 2014-15.

3. That the learned Commissioner of Income Tax (Appeals) erred in confirming the disallowance of Rs.4,99,022 made by the Assessing Officer in respect of Interest on delayed deposit of Taxes deducted at source by the assessee Company.

4 That the appellant craves leave to add, alter or withdraw any ground or grounds of appeal at or before the hearing of the appeal."

3. The registry has pointed out that there is a delay of 2 days in filing the appeal. The assessee has explained that though the online appeal was filed in time, due to certain reason physical copy of the appeal paper was submitted with the delay of 2 days. Considering the above submissions and shortness of delay, the delay in filing the appeal is hereby condoned.

4. **Ground No.1 & 2** – Vide Ground Nos.1 & 2, the assessee has agitated the confirmation of addition of Rs.10,10,774/- made by the Assessing Officer invoking the provisions to section 43B of the Act for delay in depositing employees contribution to provident fund and employees state insurance.

5. Heard both the sides. At the outset, we note that the grounds of appeal relate to disallowance made 43B read with section u/s. 36(1)(va) of the Act in respect of delay in deposit of Employees' Contribution of Provident Fund and Employees State Insurance (PF & ESI) totalling to Rs.10,10,774/-. The issue relating to grounds taken by the assessee have come to rest by the recent verdict of the *Hon'ble Supreme Court in Checkmate Services Pvt. Ltd. Vs. CIT (2022) 143 taxmann.com 178 (SC) dated 12.10.2022* wherein it has been held that *"deduction u/s 36(1)(va) in respect of delayed deposit of amount collected towards employees'*

contribution to PF cannot be claimed when deposited within the due date of filing of return even when read with Section 43B of the Income-tax Act,1961." Relevant extract of the said judgment is reproduced as under:

> *"The deduction made by employers to approved provident fund schemes, is the subject matter of Section 36(1) (iv). It is noteworthy, that this provision was part of the original IT Act; it has largely remained unaltered. On the other hand, Section 36(1)(va) was specifically inserted by the Finance Act, 1987, w.e.f. 01-04-1988. Through the same amendment, by Section 3(b), Section 2(24) – which defines various kinds of "income" – inserted clause (x). This is a significant amendment, because Parliament intended that amounts not earned by the assessee, but received by it, - whether in the form of deductions, or otherwise, as receipts, were to be treated as income. The inclusion of a class of receipt, i.e., amounts received (or deducted from the employees) were to be part of the employer/assessee's income. Since these amounts were not receipts that belonged to the assessee, but were held by it, as trustees, as it were, Section 36(1)(va) was inserted specifically to ensure that if these receipts were deposited in the EPF/ESI accounts of the employees concerned, they could be treated as deductions. Section 36(1)(va) was hedged with the condition that the amounts/receipts had to be deposited by the employer, with the EPF/ESI, on or before the due date. The last expression "due date" was dealt with in the explanation as the date by which such amounts had to be credited by the employer, in the concerned enactments such as EPF/ESI Acts. Importantly, such a condition (i.e., depositing the amount on or before the due date) has not been enacted in relation to the employer's contribution (i.e., Section 36(1)(iv)).*
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> *• The significance of this is that Parliament treated contributions under Section 36(1)(va) from those under Section 36(1)(iv). The latter (hereinafter, "employers' contribution") is described as "sum paid by the assessee as an employer by way of contribution towards a recognized provident fund". However, the phraseology of Section 36(1)(va) differs from Section 36(1)(iv). It enacts that "any sum received by the assessee from any of his employees to which the provisions of sub-clause (x) of clause (24) of section 2 apply, if such sum is credited by the assessee to the employee's account in the relevant fund or funds on or before the due date." The essential character of an employees' contribution, i.e., that it is part of the employees' income, held in trust by the employer is underlined by the condition that it has to be deposited on or before the due date.*
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> *• The differentiation is also evident from the fact that each of these contributions is separately dealt with in different clauses of Section 36 (1). All these establish that Parliament, while introducing Section*

36(1)(va) along with Section 2(24)(x), was aware of the distinction between the two types of contributions. There was a statutory classification, under the IT Act, between the two.

• There is no doubt that in Alom Extrusions, this court did consider the impact of deletion of second proviso to Section 43B, which mandated that unless the amount of employers' contribution was deposited with the authorities, the deduction otherwise permissible in law, would not be available. This court was of the opinion that the omission was curative, and that as long as the employer deposited the dues, before filing the return of income tax, the deduction was available. A reading of the judgment in Alom Extrusions, would reveal that this court, did not consider Sections 2(24)(x) and 36(1)(va). Furthermore, the separate provisions in Section 36(1) for employers' contribution and employees' contribution, too went unnoticed.

• When Parliament introduced Section 43B, what was on the statute book, was only employer's contribution (Section 36(1)(iv)). At that point in time, there was no question of employee's contribution being considered as part of the employer's earning. On the application of the original principles of law it could have been treated only as receipts not amounting to income. When Parliament introduced the amendments in 1988-89, inserting Section 36(1)(va) and simultaneously inserting the second proviso of Section 43B, its intention was not to treat the disparate nature of the amounts, similarly. As discussed previously, the memorandum introducing the Finance Bill clearly stated that the provisions – especially second proviso to Section 43B - was introduced to ensure timely payments were made by the employer to the concerned fund (EPF, ESI, etc.) and avoid the mischief of employers retaining amounts for long periods. That Parliament intended to retain the separate character of these two amounts, is evident from the use of different language. Section 2(24)(x) too, deems amount received from the employees (whether the amount is received from the employee or by way of deduction authorized by the statute) as income - it is the character of the amount that is important, i.e., not income earned. Thus, amounts retained by the employer from out of the employee's income by way of deduction etc. were treated as income in the hands of the employer. The significance of this provision is that on the one hand it brought into the fold of "income" amounts that were receipts or deductions from employees income; at the time, payment within the prescribed time – by way of contribution of the employees' share to their credit with the relevant fund is to be treated as deduction (Section 36(1)(va)). The other important feature is that this distinction between the employers' contribution (Section 36(1)(iv)) and employees' contribution required to be deposited by the employer (Section 36(1)(va)) was maintained - and continues to be maintained. On the other hand, Section 43B covers all deductions that are permissible as expenditures, or out-goings forming part of the

assessees' liability. These include liabilities such as tax liability, cess duties etc. or interest liability having regard to the terms of the contract. Thus, timely payment of these alone entitle an assessee to the benefit of deduction from the total income. The essential objective of Section 43B is to ensure that if assessees are following the mercantile method of accounting, nevertheless, the deduction of such liabilities, based only on book entries, would not be given. To pass muster, actual payments were a necessary pre-condition for allowing the expenditure.

• The distinction between an employer's contribution which is its primary liability under law – in terms of Section 36(1)(iv), and its liability to deposit amounts received by it or deducted by it (Section 36(1)(va)) is, thus crucial. The former forms part of the employers' income, and the later retains its character as an income (albeit deemed), by virtue of Section 2(24)(x) - unless the conditions spelt by Explanation to Section 36(1)(va) are satisfied i.e., depositing such amount received or deducted from the employee on or before the due date. In other words, there is a marked distinction between the nature and character of the two amounts – the employer's liability is to be paid out of its income whereas the second is deemed an income, by definition, since it is the deduction from the employees' income and held in trust by the employer. This marked distinction has to be borne while interpreting the obligation of every assessee under Section 43B.

• The non-obstante clause in section 43B would not in any manner dilute or override the employer's obligation under section 36(1)(va) to deposit the amounts retained by it or deducted by it from the employee's income, unless the condition that it is deposited on or before the due date, is correct and justified. The non-obstante clause has to be understood in the context of the entire provision of Section 43B which is to ensure timely payment before the returns are filed, of certain liabilities which are to be borne by the assessee in the form of tax, interest payment and other statutory liability. In the case of these liabilities, what constitutes the due date is defined by the statute. Nevertheless, the assessees are given some leeway in that as long as deposits are made beyond the due date, but before the date of filing the return, the deduction is allowed. That, however, cannot apply in the case of amounts which are held in trust, as it is in the case of employees' contributions- which are deducted from their income. They are not part of the assessee employer's income, nor are they heads of deduction per se in the form of statutory pay out. They are others' income, monies, only deemed to be income, with the object of ensuring that they are paid within the due date specified in the particular law. They have to be deposited in terms of such welfare enactments. It is upon deposit, in terms of those enactments and on or before the due dates mandated by such concerned law, that the amount which is otherwise retained, and deemed an income, is treated as a deduction. Thus, it is an essential condition for the deduction that such amounts are

deposited on or before the due date. If such interpretation were to be adopted, the non-obstante clause under Section 43B or anything contained in that provision would not absolve the assessee from its liability to deposit the employee's contribution on or before the due date as a condition for deduction."

6. Respectfully following the decision of Hon'ble Supreme Court (supra) which squarely covers the grounds taken by the assessee are dismissed. Ground Nos.1 & 2 of the assessee are dismissed.

7. **Ground No.3** – Vide Ground no.3, the assessee has agitated the confirmation of disallowance of Rs.4,99,022/- made by the Assessing Officer in respect of interest on delayed deposit of 'taxes deducted at source' (TDS).

8. The Assessing Officer observed from the profit and loss account of the assessee that the assessee had claimed a sum of Rs.4,99,022/- as expenses for interest paid on TDS. The Assessing Officer observed that such payment of interest on delayed deposit of TDS was not an allowable deduction. He accordingly disallowed the aforesaid expenditure claimed by the assessee.

9. In appeal, the ld. CIT(A), while relying upon various decisions of High Courts and Coordinate Benches of the Tribunal, confirmed the addition so made by the Assessing Officer. The relevant part of the order of the CIT(A), for the sake of ready reference, is reproduced as under:

*"7. **Additional Ground relating to addition on account of interest on TDS claimed as expense***

7.1 This ground relates to the disallowance made by the AO amounting to Rs. 4,99,022/- on account of interest on delayed payment of TDS. The appellant is allowed to raise this ground in this appeal.

7.2 On the facts of the case, it is seen that when the appellant wasasked to show cause by the AO as to why expenses claimed on account

ofinterest on delayed payment of TDS be not disallowed, the appellant had not contested it before the AO. The AO held that such expenses are penalin nature and therefore cannot be allowed.

7.3 Before me, the appellant citing various decisions of different courts;has argued that the expenses in question are covered under the ambit ofsection 37 of the Act. With profound respect to the decisions of courts, cited by the appellant, I am unable to agree and comprehend as how interest on delayed TDS payment can assume the character of business expenditureu/s 37 of the Act. It remains of penal nature being compensation for defaultof the appellant in late payment of TDS, already deducted, to the account ofthe Central Government. In holding this, I find solace and derive strengthfrom the decisions of various courts including Hon'ble Supreme Court asdiscussed below:

7.4 Madras High Court in the case of CIT vs. Chennai Properties andInvestment Ltd. (1999) 239 ITR 435 (Mad.) has held the same issueagainst the assessee and disallowed the interest paid under section 201(1A) of the Act. It was held that it cannot assume the character ofbusiness expenditure and is not allowable as a deduction as the liability topay interest is directly related to the failure to deduct or remit the taxdeducted at source.

> *In para 8 and para 14 of the Judgement, the High Court observed as follows-*
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> *8. The liability for deduction of tax arises by reason of the provisions of the Act. Under Section 201, the consequence of failure to comply with the same renders that person liable to be deemed as an assessee in default with all the consequences attached thereto. The liability to pay interest on the amount not deducted or deducted but not paid is directly related to the failure to deduct or remit the amount. The amount required to be deducted is the amount payable as income-tax. The interest paid for the period of delay takes colour from the nature of the principal amount required to be paid, but not paid within time. The principal amount here would be the income-tax and the interest payable for delayed payment is the consequence of failure to pay the tax and in the circumstances, in the nature of a penalty though not described as such in Sub-section (1A) of Section 201 of the Act. The fact that the income-tax required to be remitted was not income-tax payable by the assessee, but is ultimately for the benefit of and to the credit of the recipient of the income on whose behalf that tax is payable does not in any manner alter the character of the payment, namely, its character as income tax.*
>
> *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.*

7.5The Bombay High Court in the case of Ferro Alloys Corporation Ltd. vs. CIT (1992) 196 ITR 406 (Bom) and Calcutta High Court judgment in the case of Martin and Harris Pvt. Ltd, vs. CIT [1994] 73 Taxman 555 (Cal.): Income Tax Reference No. 113 Of 1983 have also taken the similar views and held that interest u/s 201(1A) is not deductible as business expenditure under section 37. Both these decisions find a place in the case of Chennai Properties and Investment Ltd. (supra).

7.6 In the case of Martin and Harris Pvt. Ltd. (supra), the question to be decided was whether interest paid by the company under section 201(1A) for belated payment of tax deducted at source from the employees' salary was allowable as a deduction in the computation of its total income. Hon'ble Court categorically held as under:

> *4. We are unable to accept this contention of the learned counsel. It is not only illogical but also fallacious. Section 201 provides for the consequences of failure to deduct or pay tax. It provides that where a person defaults in fulfilment of the obligation to deduct tax at source and to pay it to the credit of the Central Government within the prescribed time, he will be treated as an assessee-in-default in respect of the tax. Section 201(1A) provides that such defaulter, i.e., a person who either does not deduct or after deducting fails to pay tax as required by or under the Act, shall be liable to pay simple interest at the prescribed rate on the amount of the tax from the date on which such tax was deductible to the date on which such tax is actually paid to the credit of the Central Government.*
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> *5. Admittedly, the assessee deducted tax from the salary of the employees and thereafter failed to deposit the tax so deducted within the time prescribed by statute and the rules made thereunder. Because of this infraction of law the assessee was treated as an assessee-in-default and the procedure for recovery contemplated under the Act was invoked. Section 201 enacts a three-fold punishment for a person including a company bound to deduct tax at source and defaulting to deduct tax and defaulting to so deduct tax or after having deducted, defaulting in making payment thereof to the credit of the Central Government. Firstly, the defaulter is treated as an assessee in default and one of the consequences flowing therefrom is that the assessee-in-default is liable to pay a penalty*

under section 221 of the Act. Secondly, he is liable to pay interest at the prescribed rate on the amount of such tax from the date on which such tax was deductible to the date when such tax is actually paid. The third consequence is that it creates a statutory charge upon all the assets of the defaulter for the amount of tax deducted and not paid plus the amount of interest leviable under section 201(1A) : Therefore, it is not a part of the salary of the employees which was withheld. It was tax on salary of the employees which was deducted but not paid. Had it not been deducted by the employer, the employees would have paid the tax themselves. The assessee knowing fully well that it had deducted the tax payable on the salary of the employees failed to pay the tax so deducted within the prescribed period.

6. Further, under section 203 of the Act every person deducting tax in accordance with the provisions of the relevant section of the Act is required to furnish a certificate, inter alia, to the effect to the concerned person that tax has been deducted and specifying the amount so deducted, and the rate at which tax has been deducted at source. Therefore what has been deducted is tax and it does not retain the character of salary although such deduction has been made from the salary.

7. In our view the character and quality of interest payable for non-compliance with the provisions of the Act would be the same, whether it is levied for non-submission of return in time or non-payment of tax within the prescribed time or for any other reason. In National Engg. Industries Ltd. case (supra) this Court held that interest paid under section 220(2) of the Act for delayed payment of taxes was not allowable as deduction in computation of the total income.

10. In our view whenever interest is charged under the Act, whether for delayed payment of tax or filing under estimate of tax or for non-submission of the estimate or return or for default in filing return within the time or delay in making payment of tax, it cannot be allowed as deduction in computing total income as essentially interest in such a case for non-compliance with the provisions of the Act is inextricably connected with the amount of income-tax. Where income-tax itself is not a deductible amount, be it compensation or be it penalty, payable in addition to the tax cannot be allowed as a deduction in computing total income.

7.7 Following the decisions of Madras High Court, Bombay High Court and the Calcutta High Court in the above cases, the ITAT Mumbai in the case of ***HTA Marketing Services Pvt. Ltd. vs. DCIT in ITA No.***

2068/Mum/2017 *decided on 12.09.2018 held that the Assessing Officer was right in disallowing interest on late deposit of TDS.*

7.8 Again ITAT Ahmedabad in the case of ***Shree Saras Spices & Food P. Ltd. vs. DCIT in ITA No. 2527/Ahd/2010*** *decided on 09.11.2012 has decided the issue in favour of the revenue and disallowed the interest paid on belated deposit of TDS u/s 201(1A) following the Supreme Court decision in the case of* ***East India Pharmaceutical Works Ltd. v. CIT (1997) 224 ITR 627 (SC)****. The question before the Supreme Court was whether the payment of interest on money borrowed for payment of income-tax was an expenditure laid out wholly and exclusively for the purpose of business as contemplated by sub- section (1) of Section 37 of the Income-tax Act, 1961. The Supreme Court had decided the issue in favour of the revenue and against the assessee.*

7.9 From the analysis of the above cases it can be seen that there is a consensus among the Courts and it has been consistently held that interest paid u/s 201(1A) for delay in deposit of TDS is not allowed as business expenditure."

10. Contesting the above findings of the CIT(A), the ld. Counsel for the assessee has made the following written submissions:

"3. In this Ground of Appeal the Assessee claimed deduction of interest on delayed deposit of Tax Deducted at Source. The Assessee had relied on various judgements rendered by Hon'ble Kolkata Tribunal and Hon'ble Mumbai Tribunal. The Hon'ble Kolkata Tribunal had allowed such claim in the case of NarayaniIspat Alloys Ltd. and the Hon'ble Mumbai Tribunal in the case of Mukund Ltd. The has been placed in the Paper Book of Judgements.

3.1 The Ld. Commissioner Appeals dismissed this ground of appeal mainly relying on the Judgement of Hon'ble Calcutta High Court in the case of Martin and Harris Private Limited -VS- CIT and also the judgement of Hon'ble Madras High Court in the case of CIT vs. Chennai Properties & Investment Ltd. [19991 239 ITR 435 (Madras). The copies of this judgment are placed in the Paper Book at Pages 77- 81 and 115-119.

3.1.1 It is submitted that the aforesaid judgements of Hon'ble Calcutta High Court and Hon'ble Madras High Court are not applicable in this case for the following reasons.

(i) The said Judgement of Hon'ble Calcutta High Court was delivered on 17th July 1989 by Division Bench of the Hon'ble Calcutta High Court. The Hon'ble Calcutta High Court in that case held that the assessee company claimed deduction of a sum of Rs.35,769 being the expenditure incurred for the payment of interest under section 201(1A) on the amount of TDS which was not deposited within the stipulated time after deducting tax

from the salaries paid to the employees. The assessing officer disallowed the claim on the grounds that income tax being a disallowable item, interest thereon could not be allowed and that the interest was in the nature of penalty for infraction of law and hence inadmissible. The Commissioner of income tax (Appeals) as well as the Tribunal, in that case had upheld the finding of the assessing officer. The Hon'ble High Court held that whenever interest is charged under the Act, whether for delayed payment of tax or for filing under-estimate of tax or for non-submission of the estimate or return within the time, it cannot be allowed a deduction in computing total income as essentially such interest is inextricably connected with the amount of income tax.

(ii) The Judgement of Hon'ble Madras High Court in Chennai Properties case (Supra) was delivered on 20th April, 1998 by Division Bench of the Court. In this case the Hon'ble High Court, in para 14, held that 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 paid but not paid in time, which rendered the assessee liable for payment of interest, was in the nature of a direct tax and in settlement of the income-tax payable under the Income-tax Act. The interest paid under section 201(1A), therefore, would not assume the character of business expenditure and cannot be regarded as a compensatory payment as contended by the learned counsel for the assessee.

3.2 It is most humbly and respectfully submitted that in a Judgement subsequently delivered on 13th May, 1998 by Larger Bench consisting of three Judges of Hon'ble Supreme Court in the case of HarshadShantilal Mehta [1998] 99 Taxman 216 (SC), the Hon'ble Apex Court considered the issue as to whether the Interest for delayed payment of tax is "tax" within the meaning of section 2(43) of the Act. The Supreme Court held that "tax' does not include the Interest for delayed payment of tax. Please see the Judgement at pages 21 to 38 of the Paper Book. Kindly refer to Page No. 31 of the Paper Book. The Hon'ble Apex Court framed 6 Questions of law. I refer to Q. 5 "whether taxes include penalty and interest". The answer to this question is at Page No. 37 of the Paper Book. The Hon'ble Supreme Court held that the definition of 'tax' under section 2(43) of the Act does not include Interest or penalty.

3.2.1 It is most humbly submitted that the Judgement of Hon'ble Supreme Court was delivered subsequent to the Judgements by Hon'ble Calcutta High Court and by Hon'ble Madras High Court and that the Judgement of Hon'ble Supreme Court Was delivered by a larger Bench consisting of three Judges, the decision of Hon'ble Calcutta High Court and that of Madras High Court is distinguishable and has not binding precedence on this issue.

4. Now, I refer to various Judgements of different High Courts, the copies of which are given in the Paper Book.

4.1 First of all I place before your Honours the Judgement of Hon'ble Bombay High Court in the case of Oryx Finance and Investment Private Limited placed at page numbers 39 to 45 of the paper book. The counsel of the Assessee in that case hadcontended, at Para 7 of the Judgement, that "tax" does not include "Interest" and forthis proposition he relied on the Judgement of Apex Court in the case of HarshadShantilal Mehta. The Hon'ble High Court decided this issue in favour of the assessee.Please see Paras 9 to 21 of the Judgement. While deciding the issue, the Hon'bleHigh Court, in Para 18 and 19 of the Judgement referred to and relied on theJudgement of Apex Court in the case of HarshadShantilal Mehta.

4.2 Now, I refer to the Judgement of Hon'ble Bombay High Court in the case ofDinesh T. Tailor, placed in the Paper Book at Pages 46 – 53. This judgement wasdelivered by Hon'ble Justice Dr. D. Y. Chandrachud. In Para 8 of the Judgement theHon'ble High Court referred to the definition of the word "tax" and then in Para 10 ofthe Judgement referred to the Judgement of Apex Court in the case of HarshadShantilal Mehta to say that "tax' do not include Interest or penalty. It is important tonote that in Para 12 of the Judgement the Hon'ble High Court held that "In Unionof India -vs- ManikDattatreyaLotikar [1988] 172 ITR 1 a division Bench of thiscourt held that expression "tax" for the purposes of section 179 would includea penalty. The judgement of the Division Bench cannot now be reflective of thecorrect position in law in view of the judgment of the Supreme Court in HarshadShantilal Mehta case in so far as the aforesaid issue is concerned.

4.3 Now, I refer to the judgement of Hon'ble Gujarat High Court in the case ofMaganbhaiHansrajbhai Patel vs. ACIT [2012] 26 taxmann.com 226 (Gujarat). Thecopy of the Judgement has been placed at pages 54 - 68 of the Paper Book. – Kindlysee Para 10 onwards of the Judgement at Pages 63 to 66 of the Paper Book. Pleasesee Para 10 wherein the Hon'ble Gujarat High Court referred to the Judgement ofApex Court in the case of HarshadShantilal Mehta and held that tax does not includeInterest or penalty.

4.4 Now, I refer to the Judgement of Hon'ble Delhi High Court in the case of SanjayGhai vs. ACIT [2012] 26 taxmann.com 203 (Delhi) placed at Pages 69 to 76 of thePB. I refer to Para 5 of the Judgement wherein Hon'ble Delhi High Court referred tothe Judgement of Hon'ble Bombay High Court in the case of Dinesh K. Taitor and theJudgement of Hon'ble Apex Court in the case of HarshadShantilal Mehta. Afterdetailed discussion of these judgements it was held that "tax" within the meaning ofsection 2(43) of the Act does not include "Interest" and "Penalty'.

4.5 Now, I refer to the Judgement of Hon'ble Mumbai Tribunal in the case of Mukund Ltd. at pages 1 to 20 of the paper book. In this case the relevant issue was in respect of allowability of interest on delayed

payment of TDS. This issue has been dealt in paragraph 19 of the judgement. Hon'ble Mumbai ITAT, relying on the judgement of Hon'ble Supreme Court in the case of HarshadShantilal Mehta held thatthe definition of "tax" contemplated in sec 2(43) of the Act does not include Interest orPenalty and therefore the Interest on delayed payment of TDS is an allowableexpenditure.

4.6 Now, I refer to the Judgement of Hon'ble Kolkata Tribunal in the case ofLexicon Commercial Enterprise Ltd, placed at Pages 104 to 107 of the Paper Book.Hon'ble Jurisdictional Tribunal at Para 5, relying on the Judgement of Hon'ble MumbaiITAT, in the case of Mukund Ltd., held that the payment of Interest on delayed paymentof TDS is an allowable expenditure u/s 37(1) of the Act.

4.7 Now, I refer to another Judgement of Hon'ble Kolkata Tribunal in the case ofNaaraayani Sons Pvt. Ltd., placed at pages 108 to 114 of the Paper Book. I refer toPara 6 of the said Judgement wherein referring to the judgement in the case ofNarayaniIspatPvt. Ltd. [ITA No. 2127/Kol/14 dated 30.08.2017) it was held that theInterest on delayed payment of TDS is compensatory in nature and therefore the sameis allowable as business expenditure."

11. Apart from that, the ld. counsel for the assessee has invited our attention to the provisions of **section 40(a)(ii),** which read as under:

"Amount not deductible.

40. Notwithstanding anything to the contrary in sections 30 to [38], the following amounts shall not be deducted in computing the income chargeable under the head "Profit and gains of business or profession",-

(a) in the case of any assessee –

(ii) any sum paid on account of any rate or tax levied on the profits or gains of any business or profession or assessed at a proportion of, or otherwise on the basis of, any such profits or gains.

Explanation 1.—For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, any sum paid on account of any rate or tax levied includes and shall be deemed always to have included any sum eligible for relief of tax under section 90 or, as the case may be, deduction from the Indian income-tax payable under section 91.

Explanation 2.—For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, any sum paid on account of any rate or tax levied includes any sum eligible for relief of tax under section 90A;"

12. The ld. counsel, in this respect, has submitted that section 40 specifically provides as to which of the amounts shall not be deducted in computing the income chargeable under the head "profit and gains of business". He in this respect has submitted that as per the provisions of section 40(a)(ii) only the sum on account of any rate or tax levied has been held to be not deductible and that the interest on delayed payment on tax, has not been mentioned under the said provision. He, therefore, has contended that the word 'tax' does not include the interest thereupon. The ld. Counsel,in this respect, has invited our attention to the provisions of section 2(43) which defines 'tax' as under:

> *"2(43) " tax" in relation to the assessment year commencing on the 1st day of April, 1965, and any subsequent assessment year means income- tax chargeable under the provisions of this Act, and in relation to any other assessment year income- tax and super- tax chargeable under the provisions of this Act prior to the aforesaid date [and in relation to the assessment year commencing on the 1st day of April 2006 and any subsequent assessment year includes the fringe benefit tax payable under section 115WA;]"*

While referring to the above definition, the ld. counsel has again pressed that the 'tax' does not include interest or penalty thereupon.

13. The ld. counsel has further invited our attention to the decision of the Hon'ble Supreme Court in the case of "HarshadShantilal Mehta vs. Custodian" [1998] 99 Taxman 216 (SC) to submit that one of the issue before the Hon'ble Supreme Court in the said case was "whether taxes include penalty or interest?" The ld. counsel has referred to the question no.5/para 33 of the said decision to submit that the Hon'ble Supreme Court in the said case has answered the said question in negative, the relevant part of the order of the Hon'ble Supreme Court is reproduced as under:

> *"Question No.5 33. 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 Act. Tax, penalty and interest are different concepts under the 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 51 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".*

14. He further referred to written submission as reproduced above and has submitted that in the light of the decision of the Hon'ble Supreme Court in the case of "Harshad Shantilal Mehta" (supra) which has been further followed by various High Courts including the Bombay High Court in the cases of **"CIT vs. Oryx Finance & Investment (P) Ltd."** reported in [2017] 83 taxmann.com 194(Bombay) and **"Dinesh T. Tailor vs. Tax Recovery Officer"**reported in [2010] 192 Taxman 152 (Bombay) and of the Hon'ble Gujarat High Court in the case of **"Maganbhai Hansrajbhai Patel vs. ACIT"** reported in [2012] 26 taxmann.com 226 (Gujarat) and of the Hon'ble Delhi High Court in the case of **"Sanjay Ghai vs. ACIT"** reported in [2012] 26 taxmann.com 203 (Delhi) and and has further referred to the decision of the Kolkata Tribunal in the case of "Welkin Telecom Infra (P) Ltd." reported in [2022] 142 taxmann.com 146 (Kol-Trib.). He has submitted that in the light of the propositions laid down in the said case laws, since the interest component does not form part of the tax and the same being compensatory in nature, is an allowable deduction as business expenditure in computation of taxable income. He has further submitted that even otherwise, the interest paid by an assessee for late

deposit of TDS was not towards the own tax liability of assessee, rather,it is the tax liability of the some other person (payee) on whose income, the assessee has to deduct the tax during the course of business. That the credit of the TDS deposit goes to the payee and not to the payer/assessee, therefore, the interest component thereupon cannot be said to be part of the tax liability of the assessee. That the same being compensatory in nature is liable to be allowed as business expenditure.

15. The ld. DR, on the other hand, has submitted that the TDS liability is a statutory liability fastened upon the assessee to be discharged by him. That interest of late payment of TDS is nothing but a derivative of tax and is not an allowable expenditure even under the provisions of section 36 and 37 of the Act.

16. We have considered the rival contentions and gone through the record. Before proceeding further, it will be relevant to refer to certain provisions of the Income Tax Act. Section 4 of the Act, which defines 'charge of Income Tax', for the sake of ready reference, is reproduced as under:

> ***"4. Charge of income- tax***
>
> *(1) Where any Central Act enacts that income- tax shall be charged for any assessment year at any rate or rates, income- tax at that rate or those rates shall be charged for that year in accordance with, and subject to the provisions (including provisions for the levy of additional income- tax) of, this Act] in respect of the total income of the previous year] of every person: Provided that where by virtue of any provision of this Act income- tax is to be charged in respect of the income of a period other than the previous year, income- tax shall be charged accordingly.*
>
> *Provided that where by virtue of any provision of this Act income-tax is to be charged in respect of the income of a period other than the previous year, income-tax shall be charged accordingly.*

(2) In respect of income chargeable under sub- section (1), income- tax shall be deducted at the source or paid in advance, where it is so deductible or payable under any provision of this Act."

17. A perusal of section 4(2) would reveal that in respect of income chargeable to tax, income-tax shall be deducted at source or paid in advance, where it is so required under the provisions of the Act. At this stage, it will be relevant to refer to the provisions to section 201of the Act, which read as under:

"Consequences of failure to deduct or pay.

201. *(1) Where any person, including the principal officer of a company,—*

(a) who is required to deduct any sum in accordance with the provisions of this Act; or

(b) referred to in sub-section (1A) of section 192, being an employer,

does not deduct, or does not pay, or after so deducting fails to pay, the whole or any part of the tax, as required by or under this Act, then, such person, shall, without prejudice to any other consequences which he may incur, ***be deemed to be an assessee in default in respect of such tax****:*

Provided that any person, including the principal officer of a company, who fails to deduct the whole or any part of the tax in accordance with the provisions of this Chapter on the sum paid to a resident or on the sum credited to the account of a resident shall not be deemed to be an assessee in default in respect of such tax if such payee —

(i) has furnished his return of income under section 139;

(ii) has taken into account such sum for computing income in such return of income; and

(iii) has paid the tax due on the income declared by him in such return of income,

and the person furnishes a certificate to this effect from an accountant in such form as may be prescribed:

Provided further that no penalty shall be charged under section 221 from such person, unless the Assessing Officer is satisfied that such person, without good and sufficient reasons, has failed to deduct and pay such tax.

(1A) Without prejudice to the provisions of sub-section (1), if any such person, principal officer or company as is referred to in that sub-section does not deduct the whole or any part of the tax or

after deducting fails to pay the tax as required by or under this Act, he or it shall be liable to pay simple interest,—

(i) at one per cent for every month or part of a month on the amount of such tax from the date on which such tax was deductible to the date on which such tax is deducted; and

(ii) at one and one-half per cent for every month or part of a month on the amount of such tax from the date on which such tax was deducted to the date on which such tax is actually paid,

and such interest shall be paid before furnishing the statement in accordance with the provisions of sub-section (3) of section 200:]

Provided that in case any person, including the principal officer of a company fails to deduct the whole or any part of the tax in accordance with the provisions of this Chapter on the sum paid to a resident or on the sum credited to the account of a resident but is not deemed to be an assessee in default under the first proviso to sub-section (1), the interest under clause (i) shall be payable from the date on which such tax was deductible to the date of furnishing of return of income by such payee.

(2)Where the tax has not been paid as aforesaid after it is deducted, the amount of the tax together with the amount of simple interest thereon referred to in sub-section (1A)] shall be a charge upon all the assets of the person, or the company, as the case may be, referred to in sub-section (1).”

(Emphasis supplied by us)

Section 202 of the Act, being also relevant, is reproduced as under:

Deduction only one mode of recovery.

202. The power to recover tax by deduction under the foregoing provisions of this Chapter shall be without prejudice to any other mode of recovery.

Further, as per the provisions of Section 229, any sum imposed by way of interest, fine, penalty etc. shall he recoverable in the manner as provided for recovery of arrears of tax:

“Recovery of penalties, fine, interest and other sums

229. Any sum imposed by way of interest, fine, penalty, or any other sum payable under the provisions of this Act, shall be recoverable in the manner provided in this Chapter for the recovery of arrears of tax.”

18. As per the provisions of section 201(1) of the Act, a person responsible to deduct Tax, if does not deduct tax or if, after so deducting, fails to deposit the same with the Income Tax Department, **thensuch person is deemed to be an assessee in defaultin respect of such tax.** Further as per the provisions of sub section (1A), such an assessee, who fails to deduct TDS or fails to deposit the same in time, is liable to pay simple interest at the rate as prescribed therein to the Central Government and **further as per the sub-section (2) to section 201, such amount of TDS along with simple interest thereon as referred to sub-section (1A) shall be a charge upon the assets of the person responsible**. Therefore, by way of such deeming fiction, TDS though deductible from the income of the payee, becomes the tax liability of the deductor and the non-deduction or non-depositing of the same would put such person responsible/deductor in the category of tax defaulter and such tax, though leviable on the income of the payee, along with interest, becomes a charge upon the property of such person responsible/deductor.

Further, as per the provisions of section 4 of the Income Tax Act, the deduction of tax at source is one of the modes of recovery of charge of income tax.

Thus statute has casted a duty upon the payer to deduct tax on behalf of Government of India on the payment made to a payee on which such tax is liable to be deducted as per the provisions of the Act and further such deductor is required to deposit the said tax with the Central Government, failing to do so declares such a person as a defaulter of taxas if of his own tax liability by way of the deeming fiction of section 201 of the Act. Therefore, under the circumstances, no such defense is

available to the person responsible/deductoritto say that it was the liability of the other person. Even though, as per the relevant provisions, if the payee takes into account the said receipts for the purpose of computation of income and pays tax thereupon and files return of income, then such person responsible/deductor is absolved of the liability of payment of tax which he was liable to deduct and deposit but he is not absolved from the payment of interest for the period of defaultfrom the date from which such tax was liable to be deducted and the date on such tax was actually paid by the deductee/payee. This liability has been statutorily fastened upon such deductor/payer and it cannot be said to be a business expenditure of the payer.

Further, the carrying on or continuation of business by such deductor/payer is not dependent upon the payment of tax as non-payment of tax does not bar a person from continuation of his business nor the discontinuation of business absolves such a person from payment of tax liability. Such tax liability of the deductor, though, may arise in the course of business but nonetheless, this is not the expenditure for the purpose of business. To explain in a simple way, the payment to the contractor/payee may be a business expenditure but the income tax upon such payment is not the business expenditure, either of the deductor or of the deductee. Therefore, the payment of tax cannot be said to be an expenditure incurred solely and exclusively for the purpose of business or profession of the assessee nor can be the interest thereupon.

The expenditure allowable as deduction has been specifically mentioned as per the provisions of sections 30 to 36 of the Act and further section 37 of the Act is a residuary section which allows business expenditure

which stipulates that any expenditure incurred apart from expenditure described in sections 30 to 36 wholly and exclusively incurred for the purpose of business or profession, shall be allowed in computing under the head 'profit and gains of business or profession'. The interest on late payment of TDS, is not covered either under the provision of sections 30 to 36 of the Act, nor it qualifies as expenditure wholly and exclusively incurred for the purpose of business or profession u/s 37 of the Act. Even u/s 36(1) (iii) of the Act, the amount of interest paid in respect of capital borrowed for the purpose of business or profession is an allowable expenditure, but the interest paid on delayed deposit of TDS cannot, in any circumstances, be termed as capital borrowed from the Income Tax department for the purpose of business. For claiming anyexpense as deduction, firstly it should qualify and fall within the ambit and scope of deductible expenditure as per the provisions of section 30 to 37 of the Act. If an amount does not qualify as a deductible expenditure under the provisions of sections 30 to 37 of the Act, then, even though, the same has not been specifically excluded u/s 40 or to be more specifically 40(ii) of the Act, even then non-exclusion does not put it into the category of allowable expenditure.

19. At this stage, reliance can be placed on the recent decision of the co-ordinate Delhi bench of the Tribunal in the case of "Universal Energies ltd. Vs DCIT" ITA No. 2761/Del/2018 decided vide order dated 26.07.2022, wherein the Tribunal has made following observations in this respect:

> *"7. Interest as defined in section 2(28A) of the Act means interest payable in any manner in respect of any moneys borrowed or debt incurred (including a deposit, claim or other similar right or obligation) and includes any service fee or other charge in respect of the moneys borrowed or debt incurred or in respect of any credit facility which has*

not been utilized. Hence, Section 36(1)(iii) of the Act allows a deduction for interest paid on capital borrowed while computing the business income of the taxpayer. It provides deduction of the interest paid in respect of capital borrowed for the purpose of the business or profession.

8. In the case of K.M.S .Lakshmanier And Sons vs. CIT 1953 AIR 145:1953 SCR 1057 (SC) it was held that the expression "borrowed money" means real borrowing or real lending . It must be construed in its natural and ordinary meaning and implies a real borrowing and real lending . It requires the existence of a borrower and a lender and accordingly there must be a real borrowing .

9. Unlike section 2(28A), clause (iii) of section 36(1) does not use the term 'debt incurred' . Hence, section 2(28A) defines 'interest' in a wider sense whereas Section 36(1)(iii) has used it in a restrictive manner . Therefore, it may be concluded that there must be a loan on which interest is paid for claiming allowance u/s 36(1)(iii) of the Act. Existence of lender and borrower are must in case of a loan transaction . Hence, it can be safely concluded that non-payment of taxes does not amount to the borrowing of capital from the Government and hence interest paid for delayed deposit of taxes is not covered under section 36(1)(iii) of the Act…"

20. So far as the reliance by the ld. counsel for the assessee on the decision of the Hon'ble Supreme Court in the case of "Harshad Shantilal Mehta" (supra) is concerned, we find that the issue for determination before the Hon'ble Supreme Court was entirely a different issue relevant to the interpretation of provisions of section 11 of the 'Special Court (Trial of Offences relating to Transactions in Securities) Act, 1992'.

As discussed by the Hon'ble Supreme Court in the case of Canara Bank Vs. Nuclear Power Corporation Of India Ltd. And Ors. [1995] 3 JT 42, the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992, was enacted to deal with the situation arising out of the large scale irregularities and malpractices which were noticed in the securities transactions of banks, to ensure the speedy trial of the offenders, to recover properties of the offenders with a view to prevent

diversion of such properties by the persons responsible for these offences and to provide for the establishment of a special court for the trial of offences relating to transactions in securities and matters connected therewith or incidental thereto. Securities were defined in Section 2(c) of the said Act to include shares, scrips, stocks, bonds, debentures, debenture stock, units and other marketable securities of a like nature, Government securities and rights or interests in securities. Section 3(1) provided for the appointment by the Central Government of a Custodian. By reason of Section 3, the Custodian was empowered, on being satisfied on information received that any person had been involved in any offence relating to transactions in securities after 1st April, 1991, and before 6th June, 1992 (the stated dates), to notify the name of such person in the Official Gazette. On and from the date of such notification, by reason of Section 3(3), property, movable and immovable, belonging to the person notified stood attached and, by reason of Section 3(4), could be dealt with by the Custodian in such manner as the Special Court directed. Any person aggrieved by notification under Section 3(2) or Section 4(1) was entitled to file a petition of objection before the Special Court. By reason of Section 11(1), the Special Court could make such order as it deemed fit directing the Custodian in the matter of disposal of property under attachment. Section 11(2) set out the order in which the liabilities of the persons notified had to be discharged. Such liabilities include all revenues, taxes, cesses and rates due from the persons notified by the custodian. The relevant section 11 of the "Special Court (Trial of Offences relating to Transactions in Securities) Act, 1992" is reproduced as under:

11. Discharge of liabilities.

(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:--

(a) all revenues, taxes, cesses and rates due from the persons notified by the Custodian under sub-section (2) of section 3 to the Central Government or any State Government or any local authority;

(b) all amounts due from the person so notified by the Custodian to any bank or financial institution or mutual fund;

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

It is, in this context, that the Hon'ble Supreme Court held that the discharge of liabilities in respect of taxes, cess and rates by the custodian from the property of the person notified does not include interest on taxes. However, the said interpretation by the Supreme Court defining liability upon the property of the notified person under the said Act cannot be considered to interpret the provisions of the Income Tax Act, which is rather a complete code in itself. Though the Supreme Court under the aforesaid section 11 of "Special Court (Trial of Offences relating to Transactions in Securities) Act, 1992" has held that the interest on tax will not be a charge on the property under attachment to be discharged by the custodian, however, contrary to the said provision, section 201(2) of the Income Tax Act specifically provides that the TDS either not deducted or not deposited in time along with interest thereon, shall be a charge on the property of such person responsible. Therefore, the aforesaid decision of the Hon'ble Supreme Court in the case of "Harshad Shantilal Mehta" (supra) is, in no way, applicable to the relevant TDS provisions of the Income Tax Act.

Even, the Hon'ble Supreme Court in para 28 of the said decision has referred to the another decision of the Hon'ble Supreme Court in the case of "S.V. Kondaskar v. V.M Deshpande" reported in [1971] 1 SCC 438, wherein, the Hon'ble Supreme Court has held that the Income Tax Act is a complete code with respect to assessment and reassessment of income-tax.

21. At this stage, it is pertinent to mention here, that it is not all type of taxes that are not allowable as deduction under the Income Tax Act, but the question before us is of the allowability of interest on delayed payment income tax itself. Certain taxes such as sales tax, excise or custom duty etc. which go on to increase the purchase cost of the goods or raw material etc. are allowed as deduction under the income tax Act for arriving at the profits earned. Therefore, an interest paid on delayed payment of sales tax etc. being adding to the cost/purchase price or decreasing the profit margin on sales may be taken into account for computation of profit or to say computation of taxable income, but that concession is not available in respect of interest on Income tax. Hence, any case laws dealing with the levy of indirect taxes and interest thereupon are not applicable for the purpose of interpretation of the relevant provisions of the Income Tax Act.

22. The Hon'ble Madras High Court in the case of "Chennai Properties and Investment Ltd." (Supra) has held that the interest paid for the period of delay takes colour from the nature of the principal amount required to be paid but not paid within time. That the amount required to be deducted was the amount payable as income-tax. The Hon'ble High Court , therefore, held that 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.

The hon'ble Madras High Court further held that the fact that the income-tax required to be remitted was not income-tax payable by the assessee, but is ultimately for the benefit of and to the credit of the recipient of the income on whose behalf that tax is payable does not in any manner alter the character of the payment, namely, its character as income tax. The relevant part of the order of the hon'ble madras High Court is reproduced as under:

> *"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 ; MalwaVanaspati and Chemical Co. v. CIT [19971 225 ITR 383 and CITv. 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 ofBharat 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."*

23. The Jurisdictional Calcutta High Court in the case of "Martin & Harris (P) Ltd." (supra) observed in the case of default by the employer

in deposit of tax deducted at the salary of the employee has held that the amount of tax deducted and not paid plus the amount of interest leviable under section 201(1A) was not a part of the salary of the employees which was withheld. It was tax on salary of the employees which was deducted but not paid. Therefore what has been deducted is tax and it does not retain the character of salary although such deduction has been made from the salary. The Hon'ble Calcutta High Court, therefore, held that the character and quality of interest payable for non- compliance with the provisions of the Act would be the same, whether it is levied for non-submission of return in time or non-payment of tax within the prescribed time or for any other reason and that it cannot be allowed as deduction in computing total income as essentially interest in such a case for non-compliance with the provisions of the Act is inextricably connected with the amount of income-tax. The Hon'ble High Court categorically held that where income-tax itself is not a deductible amount, be it compensation or be it penalty, payable in addition to the tax cannot be allowed as a deduction in computing total income.The relevant part of the order of the Hon'ble Calcutta High Court in the case of "Martin & Harris (P) Ltd." (supra) has already been reproduced above as reproduced in the impugned order of the CIT(A). The findings arrived at by the Jurisdictional Calcutta High Court are, otherwise, binding on this Tribunal.

24. At this stage, reliance can also be placed on the recent decision of the Hon'ble Supreme Court in Checkmate Services Pvt. Ltd. Vs. CIT (2022) 143 taxmann.com 178 (SC) (supra) wherein, it has been held that deduction u/s 36(1)(va) in respect of delayed deposit of amount collected towards employees' contribution to PF cannot be allowed as deduction as these amounts were not receipts that belonged to the

assessee, but were held by it, as trustees. That these are others' income, monies, only deemed to be income, with the object of ensuring that they are paid within the due date specified in the particular law. These have to be deposited in terms of such welfare enactments. It is upon deposit, in terms of those enactments and on or before the due dates mandated by such concerned law, that the amount which is otherwise retained, and deemed an income, is treated as a deduction. Thus, it is an essential condition for the deduction that such amounts are deposited on or before the due date. The Hon'ble Supreme Court held that If, such interpretation were to be adopted, the non-obstante clause under Section 43B or anything contained in that provision would not absolve the assessee from its liability to deposit the employee's contribution on or before the due date as a condition for deduction.This proposition laid down by the Hon'ble Supreme Court can be well applied in case of delayed deposit of TDS. TDS by deeming fiction has been made the tax liability of the deductor to ensure that the recipient of the payment cannot fade away without paying the due taxes on the income part of such receipts. Once, the deductee pays the due taxes, the deductor is absolved from the said tax liability but not of the interest liability on the delayed payment. Allowing of such interest payment on delayed deposit of TDS as deduction would defeat the very purpose of the TDS provisions ensuring the deduction of taxes from the income of the recipient and the payment/deposit thereof with the central Govt. within the due time.

25. In view of the above discussion, we hold that the interest payment on delayed deposit of Income Tax, whether TDS or otherwise, is not an allowable expenditure.

There is no merit in the appeal of the assessee, the same is, hereby, dismissed.

26. In the result, the appeal of the assessee is dismissed.

Kolkata, the 20th January, 2023.

Sd/-	Sd/-
[गिरीश अग्रवाल /Girish Agrawal]	**[संजय गर्ग/Sanjay Garg]**
लेखा सदस्य/Accountant Member	**न्यायिक सदस्य/Judicial Member**

Dated: 20.01.2023.
RS

Copy of the order forwarded to:
1. M/s Premier Irrigation Adritec (P) Ltd
2. ACIT, Circle-11(1), Kolkata
3. CIT
(A)-
4. CIT- ,
5. CIT(DR),

//True copy//

By order

Assistant Registrar, Kolkata Benches