आयकर अपीलीय अधिकरण, हैदराबाद पीठ में
IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES "A", HYDERABAD

BEFORE

SHRI R.K. PANDA, VICE PRESIDENT
AND
SHRI LALIET KUMAR, JUDICIAL MEMBER

आ.अपी.सं / **ITA No.247/Hyd/2023**
(निर्धारण वर्ष / Assessment Year: 2018-19)

M/s. Analogics Tech India Limited, Hyderabad. PAN : AABCA7421P	Vs.	The Deputy Commissioner of Income Tax, Circle – 1(1), Hyderabad.
अपीलार्थी / Assessee		प्रत्यर्थी / Respondent

निर्धारिती द्वारा/Assessee by: Shri A. Srinivas, C.A.
राजस्व द्वारा/Revenue by: Shri Shakeer Ahamed, Sr. AR

सुनवाई की तारीख/Date of hearing: 28.08.2023
घोषणा की तारीख/Pronouncement on: 08.09.2023

O R D E R

PER LALIET KUMAR, J.M.

This appeal is filed by the assessee, feeling aggrieved by the order of Commissioner of Income Tax (Appeals), National Faceless Appeal Centre (NFAC), Delhi dt.10.03.2023 invoking proceedings under section 143(3) of the Income Tax Act, 1961 (in short, "the Act").

2. The grounds raised by the assessee read as under :

> *"1 The order of the Appellate Commissioner is contrary to law, facts and circumstances of the case.*
>
> *2. The Appellate Commissioner erred in confirming the disallowance of an amount of Rs.2,49,233/- being interest on PF/ESI paid.*
>
> *3. The Appellate Commissioner erred in confirming the disallowance of an amount of Rs.12,19,936/- being interest on TDS paid.*
>
> *4. The Appellate Commissioner erred in confirming the disallowance of an amount of Rs.26,95,847/- being interest on GST paid."*

3. The brief facts of the case are that assessee is a company filed its return of income on 31.10.2018 declaring total income of Rs.14,01,29,900/-. Assessee company was selected for complete scrutiny under CASS for the reason "large expenditure by way of penalty or fine for violation of any law for the time being in force." During the course of relevant financial year, assessee was engaged in manufacturing activity and disclosed turnover of Rs.1,60,06,46,867/-. As per 3CD Report, assessee had debited Rs.34,37,934/- as financial charges for late payment of income tax. However, in ITR, the same was not disallowed u/s 37 of the Act. On perusal of the P & L Statement filed by the assessee, it was observed that assessee had claimed Rs.76,11,490/- under the head "expenditure by way of statutory payments". The department was not convinced with the reply given the assessee to the notice u/s 143(2) of the Act and hence, issued show cause notice asking for explanation as to why an amount of Rs.76,62,297/- claimed under head "expenditure by way of statutory payments" should not be disallowed. Thus, the case was heard from time to time and the required information called for by the department was submitted. However, the Assessing Officer was not convinced by the assessee's replies and made the addition of Rs.2,49,233/- towards ESI & PF, Rs.12,19,936/-

towards interest on TDS and Rs.26,95,847/- towards interest on GST. Accordingly, the Assessing Officer completed the assessment and passed order on 29.04.2021 u/s 143(3) r.w.s. 144B of the I.T. Act.

4. Feeling aggrieved with the order passed by the assessing officer, assessee filed appeal and thereafter, it was migrated to the ld.CIT(A), NFAC, Delhi, who dismissed the appeal of the assessee.

5. Aggrieved with the order of ld.CIT(A), assessee is now in appeal before us.

6. Ground No.1 is general in nature and requires no adjudication.

6.1. **Ground No.2.**

Before us, ld. AR submitted that the interest paid on delayed payments of PF/ESI is compensatory in nature. The ld. AR submitted that the nomenclature assigned to the payment by the statute should not preclude its allowance as a deduction under section 37(1) of the Income Tax Act. In this context, he pointed out that various judicial decisions have upheld the principle that the true nature of a payment should be considered rather than its official name as defined under the law and he also referred to the decision of the Supreme Court in the case of Prakash Cottons Mills Vs. CIT Bombay and the decision of Mumbai Tribunal in the case of Neelkamal Realtors Suburban Pvt Ltd Vs ACIT, (ITA No.86/Mum/2021).

6.2 On the other hand, the ld. DR placed heavy reliance on the authorities below. To justify the conclusions reached by the learned CIT(A) that the assessee is not entitled to claim the deduction in respect of the delayed remittance of the employees' contribution of PF and ESI, he placed reliance on the decision reported in Checkmate Services Pvt. Ltd., Vs. CIT, [2022] 143 taxmann.com 178 (SC).

7. We have gone through the record in the light of the submissions made on either side.

8. Under section 2(24)(x) of the Act, the 'income' includes any sum received by the assessee from his employees as contributions to any provident fund or superannuation fund or any fund set up under the provisions of the Employees State Insurance Act, 1948 (34 of 1948) or any other fund for the welfare of the employees. It, therefore, goes without saying that this deemed income has to be treated as the income of the assessee, the moment such an amount comes to the possession of the assessee. It is open for the assessee to claim deduction of the same under section 36(1)(va) of the Act by complying with the said provision. Explanation-1 added by amendment by way of Finance Act, 2021 with effect from 01/04/2021 explains the term 'due date' and it does not impact any rights, liabilities and disabilities created by the provision. Such provisions which will only explain certain terms of the existing provision do not create any new rights or liabilities but only the rights and liabilities that were created by the provisions stood explained by the explanation, and, therefore, such explanations will take effect from the date of the provision itself.

9. In Checkmate Services Pvt. Ltd., (supra), the Hon'ble Apex Court dealt with the impact of the provisions under section 36(1)(va) of the Act in depth and while holding the issue against the assessee, held as under :

> *"53. 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.*
>
> *54. In the opinion of this Court, the reasoning in the impugned judgment that the non-obstante clause would not in any manner dilute or override the employer's obligation 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."*

10. This decision of the Hon'ble Apex Court declaring the law under the provision under section 36(1)(va) of the Act will take the retrospective effect, if not otherwise stated to be so specifically. In the decision, nothing contrary is indicated for any prospective effect only. It is, therefore clear that the law under section 36(1)(va) of the Act in the light of the Explanation-1 as declared by the Hon'ble Apex Court in the case of Checkmate Services Pvt. Ltd. (supra), shall be taken to have effect from the enactment of the provision by way of Finance Act, 1987 with effect from 01/04/1988. No other inference is possible. Therefore, we do not find any merit in the submission of the assessee as the assessee has not paid the contribution under ESI and PF Act within the time provided by the said Act. Therefore, the view of the ld.CIT(A) that if the delayed payment itself is not allowable, the question of allowing interest thereon is beyond dispute. Firstly, the payment made towards the ESI & PF should be allowable and thereafter, the question of paying the interest thereon would arise.

11. With this view of the matter, we are of the considered opinion that there is nothing illegality or irregularity in making the disallowance under section 36(1)(va) of the Act. Accordingly, this ground of appeal is dismissed.

12. **Ground No.2**

Before us, ld.AR for the assessee submitted that the assessee had paid an amount of Rs.12,19,9361/- as interest on delayed payments of Tax Deducted at Source (TDS). The ld. AR further submitted that the interest paid on late TDS payment represents the income tax liability of the third parties on whose behalf the payment was deducted by the assessee and subsequently remitted to the Government Exchequer and hence, the TDS amount does not constitute the tax liability of the

assessee and instead, it pertains to the tax liability of the parties for whom the deduction was made and paid by the assessee. To further support this viewpoint, he drew a distinction between interest under section 201(IA) and interest under section 220(2) of the Income Tax Act and emphasized that the latter is associated with the income tax liability of the assessee, while the former is more similar to interest paid on delayed payments of indirect taxes or other taxes outside the purview of direct tax laws.

13. In support of his case, ld. AR for the assessee relied on the following case laws :

1. DCIT vs. Maa Annapurna Transport Agency Ltd. in ITA No. 822/Kol/2018 decided on 15-01-2020.
2. IDS Next Business Solutions Pvt Ltd vs. ACIT in ITA No. 510/Bang/2018.
3. DCIT vs. Narayani Ispat Pvt. Ltd. in ITA No. 2127/Kol/2014.
4. STUP Consultants Pvt. Ltd. vs. ACIT in ITA No. 5827/Mum/2012.

Furthermore, the ld. AR for the assessee also referred to decision in the case of Neelkamal Realtors Suburban Pvt Ltd vs. ACIT (supra) and prayed that the interest paid on delayed payments of TDS be allowed as an expenditure under section 37(1) of the Income Tax Act.

14. On the other hand, ld. DR relied on the orders of lower authorities.

15. We have heard the rival submissions and perused the material on record. In the present case, we find that assessee paid an amount of Rs.12,19,936/- as interest on delayed payment of TDS and contended that the same may be allowed as an expenditure u/s 37(1) of the Income Tax Act. In his written statement, ld. AR for the assessee contended that the interest u/s 201(1A) cannot be compared with the interest paid u/s 220(2) of the Act. In fact, as per section 200 of the Act, there is a duty on the assessee to deduct any sum in accordance with the provisions of the Act and shall deposit the said amount after deducting it to the credit of the Government of India. In the present case, there is a failure on the part of the assessee to deduct TDS and deposit the same with the Government. The consequences for failure on the part of the assessee to deduct or pay the amount are provided in Section 201 of the Act and Section 201(1A) provides for the levy of interest on the assessee for such default.

16. Now, the question before us is as to whether the interest paid on the failure of the assessee to pay or deposit the amount within the time is compensatory in nature or not is required to be determined. Undoubtedly, the deduction of the TDS amount is required to be statutorily done by the assessee as per Section 200 of the Act in case if any payment is made under the Act which attracts deduction at the time of payment. The failure, therefore, is statutory liability on the part of the assessee in deducting the payment, and the interest paid by the assessee on the said sum is nothing but in the nature of penal provision which, in any case said to be not compensatory in nature.

Therefore, we do not find any merit in the submission of the assessee to treat the said interest paid as compensatory in nature.

17. Further, if we agree with the contention of the assessee that the interest should be allowed as allowable expenditure u/s 37(1) of the Act, then it will lead to unintentional consequences and unscrupulous persons will take the benefit of this provision and unnecessarily withhold the taxes and utilize the same for their own purposes and thereafter, claim the deduction u/s 37(1) of the Act. The same cannot be countenanced as against the spirt of the Act, as the Act contemplates that making of the payment within the time, and the consequences are provided under Sections 220 and 221 of the Act, which not only require the payment of interest but also, in case of failure to make or pay the amount, provide for declaring such a person as an assessee in default. In view of the above said reasoning, we do not find any reason to allow the ground of the assessee. Though, the assessee had relied upon various decisions of the Tribunal, however none of the case laws are applicable to the facts of the case. Further, the judgment in the case of M/s. Neelkamal Realtors Suburban Pvt. Ltd (supra) and the decision in the case of DCIT Vs. Maa Annapurna Transport Agency Ltd. (supra) are dealt with the issue of TDS receivable which has been taxed in the assessment year. However, the issue in the present ground is that the interest paid on delayed deposit of TDS is an allowable expenditure or not. The said two case laws are also not applicable to the facts of the present ground along with other case laws relied upon by the assessee.

17.1. We also find that identical issue has been decided by the co-ordinate Bench in case of Universal Energies Limited Vs. DCIT in ITA No.2761/Del/2018 dt.26.07.2022, wherein the co-ordinate Bench in Para 16 held that interest payment on late payment of TDS is not compensatory in nature and is not allowable as deduction u/s 37(1) of the Act. In view of the foregoing reasoning and in view of the decision in the case of Universal Energies Limited (supra), we confirm the disallowance made by the Assessing Officer. Thus, this ground of appeal is dismissed.

18. **Ground No.3**

With respect to ground No.3, ld. AR for the assessee submitted that interest expenses incurred on the late deposit of Goods and Services Tax (GST), Value Added Tax (VAT), service tax, Tax Deducted at Source (TDS), and other similar payments are allowable expenditures under section 37(1) of the Income Tax Act and are compensatory in nature and he has drawn our attention to section 50 of the GST Act which provides as under :

> ***"Section 50- Interest on delayed payment of tax.-***
>
> *(1) Every person who is liable to pay tax in accordance with the provisions of this Act or the rules made thereunder, but fails to pay the tax or any part thereof to the Government within the period prescribed, shall for the period for which the tax or any part thereof remains unpaid, pay, on his own, interest at such rate, not* ***exceeding eighteen per cent.,*** *as may be notified by the Government on the recommendations of the Council.*
>
> *[Provided that, the interest on tax payable in respect of supplies made during a tax period and declared in the return for the said period furnished after the due date in accordance with the provisions of section 39, except where such return is furnished after commencement of any proceedings under section 73 or section 74 in respect of the said period, shall be payable on that portion of the tax which is paid by debiting the electronic cash ledger]*
>
> *(2) The interest under sub-section (1) shall be calculated, in such manner as may be prescribed, from the day succeeding the day on which such tax was due to be paid.*

(3) Where the input tax credit has been wrongly availed and utilised, the registered person shall pay interest on such input tax credit wrongly availed and utilised, at such rate not exceeding twenty-four per cent. as may be notified by the Government, on the recommendations of the Council."

19. Ld. AR further relied upon the decision of co-ordinate Bench of the Tribunal in the case of Nilkamal Realtors Suburban Pvt. Ltd Vs. ACIT (supra) wherein the co-ordinate Bench of the Tribunal in para 8 and 9 has held as under :

"08. Ground no. 2 is with respect to disallowance of ₹44,651/- under section 37(1) of the Act in respect of delayed payment of service tax, provident fund, and VAT. During previous year assessee paid interest on delayed payment of service tax amounting to ₹1590/-, Interest on delayed payment of provident fund of ₹15,934/- and interest on VAT of ₹27,127/-. The assessee explained that this interest is compensatory in nature and therefore the same is allowable as expenditure. The learned Assessing Officer held that such payment is penal in nature and therefore disallowable. The learned CIT (A) confirmed the disallowance by affirming the reasons given by the learned Assessing Officer.

09. We have carefully considered the rival conditions. We find that identical issue has been decided by the co-ordinate Bench in case of Emdee Digitronics Pvt. Ltd Vs. PCIT in ITA No. 361/Kol/2019 dated 28th June, 2019, wherein the co-ordinate Bench in Para No.12 relying on the decision of M/s Naaraayani Sons Pvt. Limited, in ITA No. 1796-1798/Kol/2017, order dated 21.08.2018 held that interest expense on late deposit of VAT, service tax, TDS etc are allowable expenditure under section 37(1) of the Act. In view of the above fact, respectfully following the decision of Kolkata Bench of ITAT, we hold that such expenses are not disallowable under section 37(1) of the Act. Further, VAT laws, provident laws and service tax laws clearly provide for payment of interest if there is a delay in payment of fees. Therefore, it is apparent that those respective laws allowed the belated payment along with interest. Therefore, those are not affected by explanation–1 to section 37(1) of the Act. In view of this ground no. 2 of the appeal is allowed."

20. On the other hand, ld. DR relied upon the order of ld.CIT(A) and has drawn our attention to Para 8.4 of the order.

> *"8.4 Therefore, if an assessee is penalized under one Act, he cannot claim is deductible against his income under another Act, because that will then defeat the entire object of imposition of penalty in the form of interest. If the assessee resorts to any unlawful means to augment his profits or reduce his loss, then the expenditure incurred for these unlawful activities cannot be allowed to be deducted whether the business is lawful or otherwise. The appellant cannot be allowed to claim credit or reduction from its profit or income any interest of GST. Such interest payment was on its failure to pay or deposit the GST within time and the GST Act has penalized the appellant by levying interest such late payments and therefore the appellant cannot be rewarded or given benefit under the I.T Act by allowing it the benefit of deduction of such interest. In no way can such interest on delayed payment be considered as eligible business expenditure for deduction and it is not compensatory in nature as discussed in ground No 3 above. Considering the above discussion, I upheld the order of the AO disallowing an amount of Rs.26,95,847/- being interest on GST paid. The appeal on this ground is treated as dismissed the appeal is dismissed.*

21. We have heard the rival submissions and perused the material on record. Section 50 of the GST Act provides that the assessee is liable to pay the interest which shall not be exceeding 18% on the unpaid tax / delayed payment of GST with the Government. Now the question arises is whether the payment of 18% tax on the delayed / unpaid tax is said to be compensatory or penal in nature. This issue on the face of it is covered in favour of the assessee by the decision of the co-ordinate Benches relied upon by the assessee. In fact, in the recent decision of the jurisdictional High Court in the case of Megha Engineering & Infrastructures Ltd. [2019] 104 taxmann.com 393 (Telangana), the Hon'ble High Court had an occasion to examine the provision of section 50 of the GST Act and after examining it, it has recorded that the interest paid u/s 50 of the Act is compensatory in nature. The relevant portion of the said decision is as under :

"*28. Having thus seen the scheme of Sections 39, 41, 16 and 49, let us now take a look at Section50 about which present dispute revolves, which reads as under:*

> *"50. Interest on delayed payment of tax.—(1) Every person who is liable to pay tax in accordance with the provisions of this Act or the rules made there under, but fails to pay the tax or any part thereof to the Government within the period prescribed, shall for the period for which the tax or any part thereof remains unpaid, pay, on his own, interest at such rate, not exceeding eighteen per cent., as may be notified by the Government on the recommendations of the Council.*
>
> *(2) The interest under sub-section (1) shall be calculated, in such manner as may be prescribed, from the day succeeding the day on which such tax was due to be paid.*
>
> *(3) A taxable person who makes an undue or excess claim of input tax credit under sub-section (10) of section 42 or undue or excess reduction in output tax liability under sub-section (10) of section 43, shall pay interest on such undue or excess claim or on such undue or excess reduction, as the case may be, at such rate not exceeding twenty-four per cent., as may be notified by the Government on the recommendations of the Council."*

29. It is seen from Sub-section (1) of Section50 that the liability to pay interest arises automatically, when a person who is liable to pay tax, fails to pay the tax to the Government within the period prescribed. The liability to pay interest is in respect of the period for which the tax remains unpaid. In fact, the liability to pay interest under Section50 (1) arises even without any assessment, as the person is required to pay such interest "on his own".

30. While Sub-Section (1) of Section50 speaks about the liability to pay interest under one contingency, viz., the failure to pay tax within the period prescribed, Sub-Section (3) of Section50 speaks about the liability to pay interest under a different contingency. Whenever an undue or excess claim of ITC is made or whenever an undue or excess reduction in out-put tax liability is made, a liability to pay interest arises under Sub-section (3). The words "on his own" used in Sub-section (1), are not used in Sub-section (3) of Section 50."

31. Therefore, it is clear that the liability to pay interest under Section 50(1) is self-imposed and also automatic, without any determination by any one. Hence, the stand taken by the department that the ***liability is compensatory in nature, appears to be correct.***

22. In view of the categorical finding of jurisdictional High Court holding the liability to pay interest under section 50 is compensatory in nature, hence, we have no doubt that the interest paid by the assessee on delayed payment of GST is compensatory in nature and is, therefore, required to be allowed

u/s 37(1) of the Act. Thus, we reverse the finding of the ld.CIT(A) whereby it was held that payment of interest @ 18% is exorbitant and penal in nature. In view of the above, this ground of appeal is required to be allowed. Thus, this ground of the assessee is allowed.

23. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the Open Court on 8th September, 2023.

Sd/-	**Sd/-**
(R.K. PANDA) **VICE PRESIDENT**	**(LALIET KUMAR)** **JUDICIAL MEMBER**

Hyderabad, dated 8th September, 2023.
TYNM/sps

Copy to:

S.No	Addresses
1	M/s. Analogics Tech India Limited, Plot No.9/10, Nacharam Industrial Estate, Road No.6, Nacharam, Hyderabad – 500 076.
2	The Deputy Commissioner of Income Tax, Circle – 1(1), Hyderabad.
3	Pr.CIT, Hyderabad
4	DR, ITAT Hyderabad Benches
5	Guard File

By Order