

**IN THE INCOME TAX APPELLATE TRIBUNAL
“F” BENCH, MUMBAI**

**BEFORE SHRI ABY T VARKEY, JUDICIAL MEMBER &
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER**

**ITA No.2218/Mum/2023
(A.Y. 2016-17)**

Flemingo Dutyfree Shop Private Limited, D-73/1 TTC D-73/1 TTC Industrial Area, MIDC Turbhe, Navi Mumbai – 400705	Vs.	DCIT, Central Circle-8(4) 6 th Floor, Aayakar Bhavan, M.K. Road, New Marine Lines, Churchgate, Mumbai – 400 020
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No:AAACF7909E		
Appellant	..	Respondent

Appellant by :	J.P. Baragra
Respondent by :	Ujjawal Kumar Chavan

Date of Hearing	26.09.2023
Date of Pronouncement	16.10.2023

आदेश / ORDER

Per Amarjit Singh (AM):

This appeal filed by the assessee is directed against the order passed by the ld. ACIT, CC-8(4) dated 13.12.2018 for A.Y. 2016-17. The assessee has raised the following grounds before us:

- “1. *The Ld. CIT(A) erred in confirming the disallowance of interest paid on late payment of TDS of Rs. 28,49,944/- claimed under section 37(1) of the Income Tax Act, 1961. by treating the said loan as bogus.*
2. *The Ld. CIT(A) erred in relying on the decision of the Hon'ble SC in the case of Indian Aluminium Co. Ltd Vs. CIT (1967) 64 ITR 330 (Cal), which is not on the issue in appeal and not following the direct decision on the issue relied on by the appellant,*
 - i) *Decision of the Hon'ble ITAT, Kolkata in the case of DCIT VS. M/s Narayani Ispat Ltd.(ITA No. 2127/KOL/2014)*

- ii) *Decisions of the jurisdictional Hon'ble ITAT, Mumbai in the case of Mukand Ltd. v. Income-tax Officer, 3(2)(2), Mumbai [2019] 101 taxmann.com 214 (Mumbai - Trib.) and*
- iii) *M/s. Essar Projects (India) Ltd., In the Matter of Essar Project Management Consultants (Since Amalgamated) Vs. No.1844/Mum/2015 & 1845/Mum/2015.*

3. *The appellant craves leave to add to, amend, alter or delete all or any of the foregoing grounds of appeal.”*

2. Fact in brief is that return of income declaring total income of Rs. 26,77,84,760/- was filed on 29.11.2016. The case was subject to scrutiny assessment and notice u/s 143(2) of the Act was issued on 22.07.2017. During the course of assessment the assessing officer noticed that assessee has debited an amount of Rs.28,49,944/- towards interest on TDS under the head finance charges. On query, the assessee submitted that the delayed payment of TDS was of compensatory in nature and it was not a penal nature of expenses. However, the AO has not agreed with the explanation of the assessee and disallowed the claim of deduction of interest paid on TDS and stated that same cannot be allowed as expenditure.

3. The assessee filed the appeal before the ld. CIT(A). The ld. CIT(A) has dismissed the appeal of the assessee.

4. Heard both the sides and perused the material on record. During the course of assessment the assessing officer has disallowed the claim of deduction of interest on delayed payment of TDS. During the course of appellate proceedings before us the ld. Counsel submitted that the delayed payment of TDS was compensatory in nature and it was not a penal nature expenses and claimed it as expenditure u/s 37(1) of the Act. The ld. counsel has relied upon the decision of ITAT as follows:

- “1. In the case of DCIT Vs. M/s Narayani Ispat Pvt. Ltd., ITA No. 2127/Kol/2014
- 2. In the case of Mukand Ltd. Vs. ITO Mumbai 101 taxman.com 214

3. In the case of M/s Essar Projects (India) Ltd. Vs. ACIT ITA No. 1844/Mum/2015.”

However, during the course of appellate proceedings the ld. D.R submitted that Hon’ble High Court of Madras in the case of CIT Vs. Chennai Properties & Investment Ltd. (1999) 105 taxman.com 346 (Mad) has categorically held that interest paid u/s 201(1A) for delayed period cannot be regarded as compensatory payment and therefore cannot be allowed as a business expenditure. The ld. D.R has also referred the decision of ITAT Delhi in the case of Universal Energies Ltd. Vs. DCIT, ITA No. 2761/Del/2018 dated 26.07.2022 for A.Y. 2012-13 wherein the aforesaid decision of the Hon’ble Madras High Court was followed on the similar proposition that interest u/s 201(1A) cannot be regarded as compensatory payments. Since, the similar issue on identical facts has been decided by the Hon’ble Madras High Court in the case of Chennai Properties and Investment Ltd. as referred supra in this order, therefore, contrary the ld. Counsel has not brought any order passed by the Hon’ble High Court on the issue of claim of deduction of interest on delayed payment of TDS. With the assistance of ld. Representatives we have perused the decision of Hon’ble High Court of Madras in the case of Chennai Properties & Investment Ltd. as referred supra. The relevant extract of the decision is reproduced as under:

- “4. [Section 201](#) of the Act deals with the consequences of the failure to deduct the amount of tax which is required to be deducted by an assessee from the payments made by it to the extent required under the Act. The deduction at source is required to be made on salary under [Section 192](#), on interest paid on securities under [Section 193](#), on dividends under [Section 194](#), on interest other than interest on securities under [Section 194A](#), and the other payments referred to in [Section 195](#). [Section 198](#) of the Act provides that tax so deducted is to be shown for the purpose of computing the income of the recipient of the amount in respect of which the tax has been deducted, as the income of such recipient, and credit for the amount of the tax so deducted is to be given to such recipient under [Section 199](#) of the Act.

5. [Section 200](#) of the Act imposes a duty on the person deducting tax to pay within the prescribed time, the sum so deducted to the credit of the Central Government or as the Board directs.
6. The consequences of failure to deduct or failure to remit the amount deducted as required under the Act are set out in [Section 201](#).
7. If the payer does not deduct or remit the tax, he would be deemed to be an assessee in default in respect of the tax. Such person, however, is not liable to a penalty under [Section 221](#), if the Income-tax Officer is satisfied that the failure to deduct or remit was for good and sufficient reasons. Sub-section (1A) of [Section 201](#) without prejudice to the provisions of Sub-section (1) provides the person who fails to deduct or remit the amount of deduction in the manner required under the Act is liable to pay interest at the rates specified in that Sub-section from the date on which tax was deductible to the date on which such tax is actually paid.
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.
9. Learned counsel for the Revenue submitted placing strong reliance on the recent decision of the Supreme Court in the case of [Bharat Commerce and Industries Ltd. v. CIT](#)[1998] 230 ITR 733, that payments required to be made by way of income-tax under the [Income-tax Act](#) are not deductible as expenditure and the further amounts which a person may be required to pay by a reason of failure to comply with the provisions requiring the payments of the tax are also amounts which cannot be regarded as deductible expenditure under [Section 37](#) of the Act.
10. In that case the question considered was as to whether interest paid on delayed payment of income-tax and surtax by way of instalments, on income voluntarily disclosed under the Voluntary Disclosure of Income and [Wealth Act](#), 1976, is not in any way an expense incurred wholly or exclusively for the purpose of the assessee's business. The court held that (headnote) : "When interest is paid for committing a default in respect of the statutory liability to pay advance tax, the amount paid and the expenditure incurred in that connection is not in any way connected with preserving or promoting the business of the assessee. . . 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 court further held that (headnote) : "[Under the Income-tax Act](#), the payment of such interest is inextricably connected with the assessee's tax liability. If income-tax itself is not a permissible deduction under [Section 37](#), any interest payable for default committed by the assessee in discharging his statutory obligation under the [Income-tax Act](#), which is calculated with reference to the tax on income, cannot be allowed as deduction".

11. *Before holding so, the court considered the decision of the apex court in the case of [Mahalakshmi Sugar Mills Co. v. CIT](#) [1980] 123 ITR 429, a decision rendered by three learned judges of the apex court and held that the ratio of that judgment had no application to the case before it in the case of [Bharat Commerce and Industries Ltd. v. CIT](#) [1998] 230 ITR 733. The assessee in the case of Mahalaksami Sugar Mills Co. , had claimed deduction of interest paid on arrears of sugarcane cess. The payment of sugarcane cess, as it was observed by the court in the case of Bharat Commerce and Industries , is very much a part of the assessee's business expense and any interest on arrears of cess would, therefore, take colour from the cess which is payable, that it was an indirect tax which had to be paid in the course of carrying on business.*
12. *Learned counsel for the assessee placed reliance on the judgment of the apex court in the case of Mahalakshmi Sugar Mills Co. [1980] 123 ITR 429. As pointed out by the apex court in its later judgment in the case of Bharat Commerce and Industries [1998] 230 ITR 733, the cess which was considered in the case of Mahalakshmi Sugar Mills Co. [1980] 123 ITR 429 was an indirect tax payable in the course of the business of the assessee and the interest paid on the arrears of the cess took colour from the cess which was paid.*
13. *Learned counsel for the Revenue also referred to the decisions of the Bombay High Court in the case of [Ferro Alloys Corporation Ltd. v. CIT](#) [1992] 196 ITR 406 and the decision of the Calcutta High Court in the case of [Martin and Harris Pvt. Ltd. v. CIT](#) [1994] 73 Taxman 555. It was held in those cases that the interest paid under [Section 201\(1A\)](#) of the Act was not deductible as business expenditure under [Section 37](#) of the Act.*
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.*
15. *Counsel for the assessee in support of his submission that the interest paid by the assessee was merely compensatory in character besides*

relying on the case of Makalakshmi Sugar Mills Co. also relied on the decision of the apex court in the cases of [Prakash Cotton Mills Pvt Ltd. v. CIT](#) [1993] 201 ITR 684 ; [Malwa Vanaspati and Chemical Co. v. CIT](#) [1997] 225 ITR 383 and [CIT v. Ahmedabad Cotton Manufacturing Co. Ltd.](#) [1994] 205 ITR 163. In all these cases, the court was concerned with an indirect tax payable by the assessee in the course of its business and admissible as business expenditure. Further liability for interest which had been incurred by the assessee therein was regarded as compensatory in nature and allowable as business expenditure.

16. *The ratio of those cases is not applicable here. Income-tax is not allowable as business expenditure. The amount deducted as tax is not an item of expenditure. The amount not deducted and remitted has the character of tax and has to be remitted to the State and cannot be utilised by the assessee for its own business. The Supreme Court in the case of [Bharat Commerce and Industries](#) [1998] 230 ITR 733, rejected the argument advanced by the assessee that retention of money payable to the State as tax or income-tax would augment the capital of the assessee and the expenditure incurred, namely, interest paid for the period of such retention would assume character of business expenditure. The court held that an assessee could not possibly claim that it was borrowing from the State, the amounts payable by it as income-tax, and utilising the same as capital in its business, to contend that the interest paid for the period of delay in payment of tax amounted to a business expenditure.*
17. *The question referred to us, therefore, is required to be and is answered in the negative, in favour of the Revenue and against the assessee. The Revenue shall be entitled to costs in the sum of Rs. 1,000.”*

5. The Hon'ble High Court of Madras in the case of Chennai Properties & Investment Ltd. as discussed supra held that interest paid u/s 201(1A) would not assume the character of business expenditure and could not be recorded as a compensatory nature. It is clear from the finding of the Hon'ble Madras High Court that payment of interest on late deposit on TDS is not an expenditure incurred for the purpose of the business, therefore, the same cannot be allowed as deduction u/s 37(1) of the Act. The Hon'ble High Court has also taken the view that the interest payable for delayed payment is the consequence of failure to pay the tax. In view of the decision of Hon'ble Madras High Court as discussed supra in this order, we consider that the case of the assessee on issue and facts is squarely covered by the decision of Hon'ble Madras

High Court, therefore, we don't find any merit in the appeal of the assessee. Accordingly, all the ground of appeal of the assessee are dismissed.

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

Order pronounced in the open court on 16.10.2023

Sd/-
(Aby T Varkey)
Judicial Member

Sd/-
(Amarjit Singh)
Accountant Member

Place: Mumbai

Date 16.10.2023

Rohit: PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त / CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण DR, ITAT,
Mumbai
5. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//
आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण/ ITAT, Bench,
Mumbai.