

आयकर अपीलीय अधिकरण न्यायपीठ "एक-सदस्य" मामला रायपुर में

**IN THE INCOME TAX APPELLATE TRIBUNAL
RAIPUR BENCH "SMC", RAIPUR**

**श्री रवीश सूद, न्यायिक सदस्य के समक्ष
BEFORE SHRI RAVISH SOOD, JUDICIAL MEMBER**

आयकर अपील सं. / ITA No. 313/RPR/2023

निर्धारण वर्ष / Assessment Year : 2018-19

Barbarik Dee Vee JV
A-24, Ashoka Millenium,
Ring Road No.1, Rajendra Nagar,
Raipur (C.G.)-492 001
PAN : AACAB7461R

.....अपीलार्थी / Appellant

बनाम / V/s.

The Income Tax Officer-3(1),
Raipur (C.G.)

.....प्रत्यर्थी / Respondent

Assessee by : Shri Abhishek Mahawar, CA
Revenue by : Shri Satya Prakash Sharma, Sr. DR

सुनवाई की तारीख / Date of Hearing : 01.11.2023

घोषणा की तारीख / Date of Pronouncement : 22.11.2023

आदेश / ORDER**PER RAVISH SOOD, JM:**

The present appeal filed by the assessee is directed against the order passed by the Commissioner of Income-Tax (Appeals), National Faceless Appeal Center (NFAC), Delhi, dated 23.08.2023, which in turn arises from the order passed by the A.O under Sec.143(3) r.w.s. 143(3A) & 143(3B) of the Income-tax Act, 1961 (in short 'the Act') dated 28.01.2021 for the assessment year 2018-19. The assessee has assailed the impugned order on the following grounds of appeal:

“1. The CIT(Appeal)-NFAC has erred in both facts and in law in confirming the order passed by the National E Assessment Centre, Delhi u/s. 143(3) r.w.s. 143(3A) & 143(3B) of the Act, without considering the fact that while making the disallowance no opportunity of being heard is provided to the appellant for making submission against the proposed disallowance as per the directions issued by the CBDT for faceless assessment in notification No.61/2019 dated 12.01.2019.

2. That CIT(Appeals)-NFAC has erred in both fact and in law in confirming the disallowance of expenditure made by the National E-Assessment Centre of amounting to Rs.18,97,193/- which was never claimed by the appellant.

3. That the assessee craves to add, amend or delete any of the above grounds of appeal during the course of hearing.”

2. Succinctly stated, the assessee is a Joint venture entity (“JV” for short) formed to procure the work contract of road construction in terms of tenders invited by the Ministry of Road Transport and Highways (North). The JV is a

zero-profit entity wherein all the work/project undertaken by it was subcontracted to its members. The project undertaken by JV was executed by its members in their individual capacity including risks and resources and the corresponding revenue of the work was also shared on the basis of the work contribution made by the members.

3. The assessee had e-filed its return of income for A.Y.2018-19 on 28.10.2018 declaring an income of Rs. Nil. Subsequently, the case of the assessee was selected for compulsory scrutiny under e-assessment scheme, 2019 for verification of two issues, viz. (i) investment/advance/loan ; and (ii) contract receipts or fees.

4. During the course of the assessment proceedings, the A.O, inter alia, observed that the assessee had in its profit & loss account debited an amount of Rs.18,97,193/- as interest on TDS payable. Observing, that the interest paid by the assessee was penal in nature, the A.O called upon the assessee to show cause as to why the same may not be disallowed. In reply, it was the claim of the assessee that as interest paid on late payment of TDS was charged due to delay in deposit/payment of the same, thus, the same being compensatory in nature was allowable as an expenditure u/s. 37(1) of the Act. However, the A.O did not find favour with the claim of the assessee as regards the allowability of the interest paid on late deposit of

TDS as an expenditure u/s.37(1) of the Act. The A.O after relying on a host of judicial pronouncements concluded that the assessee's claim for deduction of interest on delayed deposit of the TDS was not allowable as a business expenditure either u/s. 36(1)(iii) or u/s. 37(1) of the Act. For the sake of clarity the crux of the observation of the A.O is culled out as under:

“19. Conclusion:

From the above judicial rulings on the issue of whether interest paid by deductor u/s 201(1A) for the delay deposit of TDS one can conclude that such interest is not allowed as business expenditure either u/s. 36(1)(iii) or under section 37(1). Court have categorically held the unpaid TDS amount does not amount to borrowings and thus interest paid for delay in deposit of TDS cannot be allowed as deduction u/s 36(1)(iii) in these cases, Courts are reluctant to accept the contention that the unpaid TDS amounts to trade liability of the deductor. Albeit, it is consistently, held that such interest-is payable-as a consequence of failure to pay the expenditure incurred for the purpose of interest payment does not relate to the business of the assessee. Being the assessee in default inc.-paying the tax, the interest is levied. Thus, it is that the payment of interest has nothing to do with the business of the assessee and accordingly, the payment of interest cannot be allowed as a deduction' under section 37 of the Act. The expenditure' incurred consequent to failure to deduct or pay the TDS, as prescribed under the provisions of the Act, cannot be allowed as deduction.

20. In view of the-above elaborate discussion, 1 do not allow payment of interest for the delay in deposit of TDS as a deduction under section 37 of the Act and bring to tax Rs.18,97,193/-.”

5. Accordingly, the A.O vide his order passed u/s. 143(3) r.w.s. 143(3A) & 143(3B) of the Act dated 28.01.2021 after disallowing the assessee's claim

for deduction of interest paid on delayed deposit of TDS determined its income at Rs.18,97193/-.

6. Aggrieved the assessee carried the matter in appeal before the CIT(Appeals) but without success. The CIT(Appeals) finding no infirmity in the view taken by the A.O upheld the disallowance of assessee's claim for deduction of interest on delayed deposit of TDS of Rs.18,97,193/-

7. The assessee being aggrieved with the order of the CIT(Appeals) has carried the matter in appeal.

8. I have heard the Ld. Authorized Representatives of both the parties, perused the orders of the lower authorities and material available on record, as well as considered the judicial pronouncements that have been pressed into service by the Ld. AR to drive home his contentions.

9. Shri Abhishek Mahawar, the Ld. Authorized Representative (for short 'AR') for the assessee at the threshold submitted that the order passed by the A.O was based on misconceived facts. Elaborating on his aforesaid contention, it was submitted by the Ld. AR that as the assessee had not claimed the interest paid on delayed deposit of TDS u/s.201(1A) of the Act as a deduction while computing its income for the year under consideration, therefore, there was no justification for the A.O to have disallowed the said

amount while computing its income. Carrying his contention further, it was submitted by the Ld. AR that the assessee-JV had not claimed the interest expenditure in its profit and loss account and had debited the same to the account of the sub-contractor (JV members itself) and had shown the said amount as a reimbursement from the member in the profit and loss account. The Ld. AR to fortify his aforesaid claim had taken us through the copy of the ledger account of "Interest and penalty on TDS A/c." appearing in its books of account for the year under consideration, Page 29 of APB. It was, thus, the claim of the Ld. AR that the amount of Rs.18,97,193/- of interest on delayed deposits of TDS which was debited to the sub-contractors A/c. (JV member), viz. M/s. Barbarik Projects Ltd., was thereafter reimbursed on back-to-back basis by the said member to the last of the paisa as such. Referring to the profit and loss account of the assessee, viz. M/s. Babarik-Dee-Vee (JV) for the year under consideration, the Ld. AR submitted that the fact that the assessee had not claimed as deduction the amount of interest of delayed deposit of TDS of Rs.18,97,193/- (supra) could safely be gathered therefrom, Page 51 of APB. Accordingly, the AR submitted that now when the assessee had not claimed the amount of delayed deposit of TDS as an expenditure in its profit and loss account, the A.O, thus, had grossly erred by proceeding with on absolutely incorrect basis, and

disallowing the said amount while computing its income for the year under consideration.

10. Per contra, the Ld. Departmental Representative (for short 'DR') relied on the orders of the lower authorities. However, the Ld. DR on being confronted with the claim of the assessee's counsel that the interest on delayed deposit of TDS was a back-to-back basis payment which was not claimed by the assessee as an expenditure in its profit and loss A/c. failed to rebut the same.

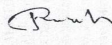
11. I have given a thoughtful consideration to the aforesaid issue, i.e., sustainability of the disallowance of interest on delayed deposit of TDS of Rs.18,97,193/- (supra) by the assessee. Before advertng any further, it would be relevant to cull out the Profit and loss account of the assessee for the year under consideration, i.e., A.Y.2018019, Page 5 of APB which reads as under:

BARBRIK - DEEVEE (JV)
{ A Joint Venture between Barbrik Project Limited as leader of JV and Deevee Projects Limited as member of JV }
STATEMENT OF PROFIT & LOSS FOR THE YEAR ENDED ON 31ST MARCH, 2018

PARTICULARS	AMOUNT (RS.)	AMOUNT (RS.)	PARTICULARS	AMOUNT (RS.)	AMOUNT (RS.)
Sub-Contract Expenses			Work Contract Receipts		13,24,91,378.00
- By Members	12,85,43,588.00				
- By Others	-	12,85,43,588.00	Goods & Service Tax Payable Re-imbursed By Members		3,02,194.00
Duties & Taxes					
- Work Contract Tax	28,23,124.00				
- Labour Cess	14,26,726.00	42,49,850.00			
Other Expenses					
Other Deduction By Government Authorities	2,53,070.00				
Bank Charges	1,888.00				
Interest on TDS Payable	18,97,193.00				
Audit Fees	25,000.00				
Less: Reimbursed By Members	(21,77,067.00)	84.00			
Net Profit / (Loss)					
		13,27,93,522.00			13,27,93,522.00

Notes forming part of the Financial Statements - Refer Annexure - A

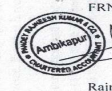
For, Barbrik - Deevee (JV)




Rajesh Kumar Agrawal
Authorised Signatory

Place : Raipur
Date : 10.07.2018

As per our report on even date
For, Pandey Rajneesh Kumar & Co.
Chartered Accountants
FRN - 014155C




Rajneesh Kumar Pandey
Proprietor
M. No. - 406090

Admittedly, it is a matter of fact borne from record that the assessee- JV had not claimed/debited the amount of interest on delayed deposit of TDS of Rs.18,97,193/- (supra) as a deduction in its profit and loss account. As stated by the Ld. AR, and rightly so, the aforesaid factual position can safely be gathered from the "Interest and penalty on TDS A/c." as appearing in the books of the assessee during the year, as under:-

BARBRIK -DEEVEE (JV) PKG-1					
Interest & Penalty on TDS					
Ledger Account					
1-Apr-2017 to 31-Mar-2018					
Date	Particulars	Vch Type	Vch No.	Debit	Credit
28-11-2017	To TDS Payable 2016-2017 Being Interest & Levy Charged Q1 132600 +3346+59800 Q2 109432+2481+41600 Q3 21294+1772+23200 Q4 37701+1486+8200	Journal	25	4,42,912.00	
	By Barbrik Project Ltd- Expenses Reimbursmment Being Amount Shifted to Reimbursment Ledger	Journal	26		4,42,912.00
	By Barbrik Project Ltd- Expenses Reimbursmment Being Amount Shifted to Reimbursment Ledger	Journal	28		12,98,640.00
30-11-2017	To TDS Payable 2015-2016 Being Interest & Levy for the financial year 2015-16 charged. Q1 interest 121455+91600 Q3 302204+54800 Q4 548622+30400 + Extra levy & Interest as per order 149559	Journal	30	12,98,640.00	
1-2-2018	To TDS Payable 2017-2018 Being Interest & Levy paid By Barbrik project limited now transferred	Journal	34	64,145.00	
	By Barbrik Project Ltd- Expenses Reimbursmment Being Balance Transferred	Journal	35		64,145.00
31-3-2018	To TDS Payable 2016-2017 Being Balance Transferred	Journal	45	91,496.00	
	By Barbrik Project Ltd- Expenses Reimbursmment Being Balance Transferred	Journal	46		91,496.00
				18,97,193.00	18,97,193.00

As is discernible from the aforesaid ledger account the amount of interest on delayed deposit of TDS of Rs.18,97,193/- (supra) was debited by the assessee JV to the account of sub-contractor (JV member) i.e. M/s. Barbarik Project Ltd., which, thereafter, was received as a reimbursement from the latter. As the amount of reimbursement of Rs.21,77,067/- received by the assessee-JV from its member, viz. M/s. Barbarik projects Ltd. was in excess of the amount that was stated to have been received on account of "Interest on delayed payment of TDS", therefore, the Ld. AR as directed had in order to dispel all doubts furnished the bifurcated details of the same, which reads as under:

Reconciliation of Re-imburement by JV members to Appellant as per Statement of Profit and Loss for the FY ended on 31st March 2018

Total Reimbursement:	21,77,067
<u>Expenses reversal due to Reimbursement</u>	
Less: Interest on delay payment of TDS	18,97,193
Less: Interest on Mobilization Advance*	2,52,986
Less: Audit Fee	25,000
Less: Bank Charges	<u>1,888</u>
Total	21,77,067

Ledgers of above expense heads are enclosed herewith

Breakup of Other Deduction by Government Authorities as per statement of Profit & Loss

a) Interest on Mobilization Advance	2,52,986
b) Other Deduction	<u>84</u>
	253,070

Other Deduction of Rs 84 made by Government Authority was not reimbursed by the JV Partners.

12. Also, the factum of reimbursement of the aforesaid expenses/ charges by M/s. Barbarik Projects Ltd. to the assessee-JV had been substantiated by the assessee by placing on record the copies of the respective ledger accounts, i.e., Interest & Penalty on TDS A/c., Interest on Mobilization advance A/c., Audit fees a/c. and bank charges a/c. As the "other deductions" by the Government authorities of Rs.84/- was not reimbursed by M/s. Barbarik Projects Ltd. (supra) to the assessee-JV, thus, the said

amount was claimed by the assessee-JV as a deduction in the Profit and loss a/c.

13. At this stage, I may herein observe that though the assessee had brought the aforesaid factual position to the notice of both the lower authorities but they had failed to take cognizance of the same and had primarily focused more on the issue as to whether or not the interest on delayed deposit of TDS u/s. 201(1A) was allowable as an expenditure u/s. 36(1)(iii) or u/s. 37(1) of the Act. Both the lower authorities had failed to address the claim of the assessee that the aforementioned amount of Rs.18,97,193/- (supra) was never claimed as an expenditure but was in the nature of a back-to-back reimbursement from its member, viz. M/s. Barbarik Project Ltd.

14. Considering the aforesaid facts, I am of the view that as stated by the Ld. AR, and rightly so, now when the assessee JV had not claimed the amount of Rs.18,97,193/- (supra) as an expenditure in its profit and loss account, the A.O, thus, was not justified in disallowing the same on the premise that it was not allowable as a deduction per the mandate of law. I, thus, in terms of my aforesaid observation, not being able to concur with the view taken by the lower authorities, set-aside the order of the CIT(Appeals) and vacate the addition/disallowance of Rs.18,97,193/- (supra) made by the

A.O. Thus, the **Ground of appeal No. 2** is allowed in terms of my aforesaid observations.

15. As the addition made by the lower authorities has been vacated by me, therefore, I refrain from dealing with the contentions of the Ld. AR wherein he has assailed the impugned addition/disallowance on the ground that the same was made without affording an opportunity to the assessee which, thus, is left open. Thus, the **Ground of appeal No.1** is disposed off accordingly.

16. **Ground of appeal Nos. 3 & 4** being general in nature are dismissed as not pressed.

17. In the result, appeal of the assessee is allowed in terms of the aforesaid observations.

Order pronounced in open court on 22nd day of November, 2023.

Sd/-

(रवीश सूद /RAVISH SOOD)

न्यायिक सदस्य/JUDICIAL MEMBER

रायपुर/ RAIPUR ; दिनांक / Dated : 22nd November, 2023.

SB

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(Appeals)-1, Raipur (C.G)

4. The Pr. CIT-1, Raipur (C.G)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, रायपुर बेंच,
रायपुर / DR, ITAT, Raipur Bench, Raipur.
6. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// True Copy //

निजी सचिव / Private Secretary
आयकर अपीलीय अधिकरण, रायपुर / ITAT, Raipur.