

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "E" MUMBAI**

**BEFORE SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER)
AND
SHRI RAJ KUMAR CHAUHAN (JUDICIAL MEMBER)**

**ITA No. 4610/MUM/2023
Assessment Year: 2021-22**

M/s Eastern Cargo Carriers (India)
Pvt. Ltd.,
Unit No. 26, Adarsh Ind. Estates,
Sahar Road, Andheri East,
Mumbai-400099.
PAN NO. AAACE 1520 E
Appellant

Vs. The Assessment Unit, Income Tax
Department,
Aaykar Bhavan, M.K. Road,
Mumbai-400020.

Respondent

Assessee by : Mr. Niraj Sheth a/w
Mr. Gunjan Kakkad
Revenue by : Mr. Hemanshu Joshi, Sr. DR

Date of Hearing : 10/12/2024
Date of pronouncement : 20/12/2024

ORDER

PER OM PRAKASH KANT, AM

This appeal by the assessee is directed against order dated 18.10.2023 passed by the Ld. Commissioner of Income-tax (Appeals) – National Faceless Appeal Centre, Delhi [in short ‘the Ld. CIT(A)’] for assessment year 2021-22, raising following grounds:



A) Disallowance u/s. 40A(2)(a) - Rs. 70,20,000/-

1) The learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre (NFAC) [CIT(A)] erred on facts and in law in confirming the disallowance made by the AO u/s. 40A(2)(a) of Rs. 70,20,000/-.

2) The learned CIT(A) and the AO failed to appreciate that no disallowance was called for u/s. 40A(2)(a) in the facts and circumstances of the case.

3) Appellant prays that the disallowance made by the AO u/s. 40A(2)(a) of Rs. 70,20,000/- and confirmed by the CIT(A), may be deleted.

B) Disallowance of expenses - Rs. 46,56,027/-

4) The learned CIT(A) having held that the reasons for disallowing 25% of expenditure were not convincing erred on facts and in law in confirming the disallowance to the extent of 10% of expenses of Rs. 4,65,60,267/- amounting to Rs. 46,56,027/-.

5) Appellant prays that the ad hoc disallowance made by the AO out of various expenses which have been confirmed by the CIT(A) to the extent of Rs. 46,56,027/-, may be deleted in toto.

C) Disallowance of interest on delayed payment of TDS - Rs. 74,662/-

6) The learned CIT(A) erred on facts and in law in confirming the disallowance of interest on delayed payment of TDS of Rs. 74,662/-.

7) Appellant prays that the disallowance of interest on delayed payment of TDS of Rs. 74,662/- as made by the AO and as confirmed by the CIT(A), may be deleted.

2. Briefly stated facts of the case are that the assessee company is an agent of International Air Transport Association(IATA) and engaged in freight forwarding business along with running a factory for recycling of different waste products at Dahej, Bharuch in Gujarat. For the year under consideration, the assessee filed return of income declaring income under the head 'profit and gains business or profession' amounting to Rs.8,85,62,030/- after claiming deduction of Rs.90,00,000/- u/s 35(1)(ii) of the Income-tax



Act, 1961 (in short 'the Act'). The return of income filed by the assessee was selected for scrutiny assessment and statutory notices under the Act were issued and partly complied with. In the scrutiny assessment completed u/s 143(3) of the Act on 27.12.2022, the Assessing Officer made three additions, **firstly**, disallowance of excessive salary/remuneration to directors/relatives of the director amounting to Rs.70,20,000/-, **secondly**, ad-hoc disallowance @ 25% of the other expenses claimed at Rs.4,65,60,267/- which was worked out to Rs.1,16,40,066/-, **thirdly**, interest amounting to Rs.,74,662/- on delayed deposit of TDS.

3. On further appeal, the Ld. CIT(A) by way of impugned order upheld the disallowance of salary/remuneration to the directors and interest on delayed deposit of TDS but restricted the ad-hoc disallowance out of other expenses to the extent of 10% of the expenses and allowed part relief to the assessee.

4. Aggrieved, the assessee is in appeal before the Tribunal by way of raising grounds as reproduced above.

5. The assessee filed a Paper Book containing pages 1 to 160. In relation to ground No. 1 of the appeal, the Ld. counsel for the assessee **firstly**, submitted that while disallowing the salary/remuneration to three of the directors/relative of the directors amounting to Rs.70,20,000/-, the Ld. Assessing Officer has compared their salary/remuneration with the other employees



having similar educational qualification but he ignored that concerned directors were having experience of looking after the sales, finance, networking and other business operations for last 40 years whereas the employees compared for the purpose of salary/remuneration were having only experience of few months and therefore, the excessive amount worked out by the Assessing Officer is unreasonable and unjustified. **Secondly**, the Ld. counsel referred to the Central Board of Direct Taxes(CBDT) Circular dated 6th July, 1968 wherein it is stated that provisions of section 40A(2)(a) of the Act are intended to check evasion of tax through excessive or unreasonable payments to relatives or associate concern and should not be applied in a manner which will cause a hardship in bonafide cases and the Income-tax Officer is expected to exercise his judgment in a reasonable and fair manner. The Ld. counsel further relied on the decision of Hon'ble Bombay Court in the case of **CIT v. Indo Saudi Services (Travel) (P.) Ltd. reported in 310 ITR 306**, decision of Hon'ble Bombay High Court in the case of **CIT v. V.S. Dempo & Co. (P.) Ltd. 336 ITR 209**, decision of Hon'ble Supreme Court in the case of **CIT v. Glaxo Smithkline Asia (P.) Ltd. reported in 236 CTR 113 (SC)**. The Ld. counsel for the assessee submitted a chart of the taxable income in the hands of three directors and tax incident in the case of the assessee and submitted that the three directors were subjected to maximum rate of the taxation along with the surcharge and therefore, there is no case of transferring the income to non-taxable entities and evasion



of tax. The Ld. counsel further submitted that a detailed explanation in this respect was submitted before the Assessing Officer on 21.12.2022 , a copy which is available on Paper Book page 61. The Ld. counsel submitted that neither the Assessing Officer nor the Ld. CIT(A) has considered the explanation of the assessee. He accordingly submitted that finding of the Ld. CIT(A) on the issue in dispute might be set aside.

6.1 On the contrary, the Ld. Departmental Representative (DR) submitted that no explanation was filed before the AO, who has passed the impugned assessment order. He stated that the assessment proceedings in the instant case were conducted in a faceless manner through electronic submission by the Faceless Assessing Officer(FAO). He referred to Paper Book page 61 and submitted that the assessee had filed said reply on 21.12.2022, before the Jurisdictional Assessing Officer(JAO), whereas scrutiny proceedings were pending before the FAO and therefore, the submission of the Ld. counsel for the assessee that Assessing Officer has not considered the explanation of the assessee is totally incorrect and devoid of truth. He further submitted no such explanation was even filed before the Ld. CIT(A) by way of additional evidence and therefore, both the authorities are justified in making/sustaining the disallowance for excessive salary/remuneration to three directors.



6.2 In the rejoinder, the Ld. counsel for the assessee submitted that if the matter is restored back to lower authorities, then the issue of tax evasion in the transaction might be examined first and if there is no tax evasion then straight way no disallowance is called for, otherwise the fair market value of the salary/remuneration might be compared with the other similarly placed directors in the freight forwarding business.

7. We have heard rival submission of the parties and perused the relevant material on record. In the case, the Assessing Officer has made disallowance of Rs.70,20,000/- out of salary/remuneration paid to the following three directors/relative of the directors restricting their salary to Rs. 12 lakhs per annum:

SN	NAME OF STAFF MEMBER	GROSS ANNUAL SALARY	Restricted amount of salary per month	Disallowance from employee benefit expenses
1	Sh. Lalit Brijnarain Seth	4515000	1200000	3315000
2	Sh. Alok Brijnarain Seth	4515000	1200000	3315000
3.	Ms. Preeti Seth	1590000	1200000	390000
Total disallowance			Rs.7020000/-	

7.1 During the assessment proceedings, the Assessing Officer(FAO) asked the assessee to justify the fair market value of the salary/remuneration paid to those persons being specified persons under section 40A(2)(b) of the Act, but in view of non-



compliance on the part of the assessee, the Assessing Officer made disallowance comparing salary/remuneration paid other similarly placed employees having similar educational qualification. The Assessing Officer has noted that above directors were having basic qualification only and no technical qualification. Before us, the Ld. counsel for the assessee has drawn attention to Paper Book Page 61 which is a explanation filed before the jurisdictional Assessing Officer (JAO) and that too after completion of assessment. We are of the view that the assessee was aware that assessment proceedings were pending before the FAO and reply to him could have filed through e-mail only but instead, the assessee filed the reply of queries raised by the FAO before the JAO, who was not having jurisdiction over instant scrutiny proceedings for the assessment year. The assessee was required to file rely/explanation/submission before the FAO only. Further, if not filed those reply or explanation before the FAO, the assessee could have filed the same before the Ld. CIT(A) also in the form of additional evidence for considering in terms of Rule 46A of the Income-tax Rules, 1962. But no additional evidences were even filed.

7.2 Before us, the Ld. counsel for the assessee has relied on the decision in the case of Indo Saudi Services (Travel) (P.) Ltd. (supra) wherein the CBDT Circular No. 6-P, dated 6th July, 1968 has been discussed. The Hon'ble High Court accordingly concluded that there is no evidence of evasion of the tax by way of payment of higher



commission to sister concern as the sister concern was also taxed in higher rate bracket. The Hon'ble High Court of Bombay in the case of V.S. Dempo & Co. (P.) Ltd. (supra) also held that when the subsidiary is in the same tax bracket and paid same rate of tax, there is no question excessive payment and therefore no disallowance could be made u/s 40A(2) of the Act. Similarly, the Hon'ble Supreme Court in the case of Glaxo Smithkline Asia (P.) Ltd. (supra) also observed that when assessee company and its service provider were related companies in terms of section 40A(2) of the Act and both were taxed at same tax rate, then entire exercise of making addition was a revenue neutral exercise. The relevant part of the Circular (supra) cited by the assessee is reproduced as under:

“74. It may be noted that the new provision is applicable to all categories of expenditure incurred in businesses and professions, including expenditure on purchase of raw materials, stores or goods, salaries to employees and also other expenditure on professional services, or by way of brokerage, commission, interest, etc. Where payment for any expenditure is found to have been made to a relative or associate concern falling within the specified categories, it will be necessary for the Income-tax Officer to scrutinise the reasonableness of the expenditure with reference to the criteria mentioned in the section. The Income-tax Officer is expected to exercise his judgment in a reasonable and fair manner. It should be borne in mind that the provision is meant to check evasion of tax through excessive or unreasonable payments to relatives and associate concerns and should not be applied in a manner which will cause hardship in bona fide cases.”

7.2 Before us, the Ld. counsel for the assessee has filed a chart submitting that concerned directors were subjected to maximum rate of tax on their income and therefore, no evasion of tax was there. Since, the issue whether those three directors or subject the



maximum rate of tax and there is no tax evasion in the entire transaction, need to be examined at the end of the Assessing Officer, therefore, we feel it appropriate to set-aside the order of ld CIT(A) on the issue in dispute and restore this issue back to the file of the Assessing Officer for verifying the claim of the assessee in accordance with the decision of the Hon'ble Bombay High Court and Supreme Court cited above. The Ground No. 1 of the appeal of the assessee is accordingly allowed for statistical purposes.

8. The ground No. 2 of the appeal of the assessee relates to ad-hoc disallowance of Rs.1,16,40,066/- which has been restricted to Rs.46,56,026/- by the Ld. CIT(A). The Assessing Officer noted that the assessee was asked to provide ledger account of other expenses amounting to Rs.4,65,60,267/- but the assessee neither filed properly maintained ledger account nor submitted copy of the bank statement highlighting payment and therefore, in absence of the same, the Ld. Assessing Officer made ad-hoc disallowance @ 25% of the total expenses of Rs.4,65,60,267/-, which was worked out to Rs.1,16,40,066/-. Before the Ld. CIT(A) also no such details were filed, but looking to the offices located across the country and services provided including air exports, air imports, sea import, sea export etc., the Ld. CIT(A) restricted the disallowance to 10% of the expenses of Rs.4,65,60,267/-. Before us, the Ld. counsel for the assessee referred to the Paper Book page 65 and submitted that all the details were filed before the Assessing Officer but same were not



considered by the AO and he made ad-hoc disallowance at the rate of 25%, which has been restricted by the Ld. CIT(A) @ 10% of the total expenses, which being purely ad-hoc in nature cannot be sustained. The Ld. counsel referred to the details of the expenses available on Paper Book page 158 to 160.

8.1 On the contrary, the Ld. DR submitted that since no details of the expenses or their vouchers were filed before the Assessing Officer and therefore there was no alternative left to the Assessing Officer otherwise then to make ad-hoc disallowance. He further submitted that the Ld. CIT(A) has restricted the disallowance @ 10% without any reasoning or justification. He accordingly submitted that matter should be restored back to the file of the Assessing Officer.

8.2 We have heard rival submission of the parties and perused the relevant material on record. The detail of other expenses, disallowance of which is in dispute, has been provided on Paper Book pages 158 to 160. On perusal, we find that expenses pertain to office expenses, Diwali expenses, staff training and recruitment, legal and professional fees, domestic travelling conveyance, printing and stationery, business promotion, commission incentives, bad debts and balance written off etc. The Assessing Officer has noted that no detailed ledger statement of each of the head of expenses was submitted, thus, there no alternative was left with him except to make part of disallowance on estimate basis. Further, the Ld.



CIT(A) has not been given any reason for restricting disallowance to 10% of the total expenses. The relevant finding of the Ld. CIT(A) is reproduced as under:

“6.3 I have gone through the assessment order and the submissions of the appellant. The appellant is in the business of International Air Transport Association agent engaged in freight forwarding business. As an IATA agent, the assessee is authorized to deal with all the airlines and have their stocks required to transport the • goods out of India. It provides services in Air Exports, Air Imports, Sea Exports, Sea Imports, Fees Express Cargo and clearance services from Mumbai, Ahmedabad, New Delhi, Kolkatt, Indore, Hyderabad, Bengaluru and Chennai. Apart from this, the assessee has a recycling factory at Dahej, Bharuch in Gujarat. Through the assessing Officer requested to submit the ledger accounts of various expenses, the assessee has not submitted the bank statement. To the show cause letter also the assessee has not responded.) In view of the above the AO has disallowed 25% of the expenditure amounting to Rs. 1,16,40,066/-. I have examined the reasons and found that the reasons are not very convincing. Therefore, disallowance is restricted to 10% of the other expenses amounting to Rs. 4,65,60,267/- l' Appellant gets part relief. The ground No. 3 is partly allowed.”

8.3 Since, the disallowance has been restricted by the ld CIT(A) to 10% of the total expenses in ad-hoc manner that too in absence of any details of ledger expenses or the vouchers produced before the Assessing Officer, therefore, we feel it appropriate to restore this issue back to the file of the Assessing Officer with the direction to the assessee to produce all the relevant ledger statement of the head of expenses along with vouchers for verification at the end of the Assessing Officer. The ground No. 2 of the appeal of the assessee is accordingly allowed for statistical purposes.



9. The ground No. 3 of the appeal relates to disallowance of the interest on delayed deposit of TDS. The Assessing Officer noted that interest on TDS is not allowable expenses and therefore he made disallowance of Rs.74,662/- accordingly. The Ld. CIT(A) also noted that the assessee had not right to utilize money collected from others on behalf of the Government. Accordingly, he sustained the disallowance. The relevant finding of the Ld. CIT(A) is reproduced as under:

“7.3 I have gone through the submissions of the appellant. Interest payment on late payment of TDS is not eligible business expenditure for deduction and it is not compensatory in nature. The assessee has no right to utilize such monies collected from others on behalf of the government. Payment of interest on late deposit of TDS levied is neither an expenditure nor exclusively incurred for the purpose of the business and therefore the same is not allowable as deduction u/s. 37(1) of the Act. Accordingly, the addition made by the AO is upheld. The Ground No. 4 is dismissed.”

9.1 Before us, the Ld. counsel for the assessee relied on its submissions made before the Ld. CIT(A) in this regard. The Ld. DR submitted that interest on TDS is not allowable expenditure and therefore, finding of the Ld. CIT(A) on the issue in dispute need to be sustained.

9.2 We have heard rival submissions of the parties and perused the relevant material on record. We find that amount of interest in dispute relates to the delayed deposit of the TDS. The Delhi Bench of Tribunal in the case of M/s. New Modern Bazaar Departmental Store Pvt. Ltd. in ITA NO. 590/Del/2018 for AY 2014-15 held that the interest on Late Payment of TDS does not constitute Business



Expenditure. The relevant finding of the Tribunal is reproduced as under:

"7. We have carefully considered the rival contentions. The above issue has already been considered by Hon'ble Madras High Court in [CIT Vs. Chennai Properties & Investment Ltd.](#) (1999) 239 ITR 435 (Mad.) wherein it has been held that interest under [Section 201\(1A\)](#) of the Act paid by the assessee does not assume the character of business expenditure and also cannot be regarded as compensatory payment. The above decision of the Hon'ble Madras High Court has also been dealt with exclusively by the various Page | 2 benches of the ITAT , specifically in [Velankani Information Systems Ltd. V DCIT \[2018\] 97 taxmann.com 599 \(Bangalore - Trib.\)/\[2018\] 173 ITD 19 \(Bangalore - Trib.\)](#) wherein considering various decisions of the Tribunal had followed the decision of the Hon'ble Madras High Court in [CIT Vs. Chennai Properties & Investment Ltd.](#) (supra) as under :-

"21. As far as delay in remittance of tax deducted at source [u/s. 201\(1A\)](#) of the Act is concerned, we find that the Hon'ble Madras High Court has taken a view that interest paid [u/s. 201\(1A\)](#) is also in the nature of tax and notwithstanding the fact that it is not the tax liability of the assessee, the same cannot be allowed as a deduction. The following were the relevant observations of the Hon'ble Madras High Court:--

"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". (emphasis supplied)

22. The decision cited by the ld. counsel for the assessee of Kolkata Bench of the Tribunal on the issue is contrary to the decision of the Hon'ble Madras High Court. Though the decision of the Tribunal is later in point of time, judicial discipline demands that the decision of the Hon'ble Madras High Court is to be followed. It is also worthwhile to mention that the Kolkata Bench of Tribunal in the case of Narayani Ispat (P.) Ltd. (supra), which was cited by the ld. counsel for the assessee, did not consider or did not have an occasion to consider the decision of the Hon'ble Madras High Court Page | 3 in the case of [Chennai Properties and Investment Ltd.](#) (supra). In these circumstances, we follow the decision of the Hon'ble Madras High Court & uphold the order of the CIT(A) insofar as it relates to disallowance of interest on delayed remittance of tax deducted at source [u/s. 201\(1A\)](#) of the Act."

8. In view of this, we do not find any merit in the appeal of the assessee and hold that interest payment on late payment of tax at source is not eligible business expenditure for deduction and it is not compensatory in nature.



9. Now we come to the various decisions cited by the assessee in the statement of facts laid down before us. The first decision that has been cited by the assessee is *CIT versus ITC Ltd* 338 ITR 598 wherein it has been held that the payment of interest u/s 201 (1A) is not a penalty. Further, the assessee has also stated the decision of *CIT versus Oriental Insurance Co Ltd* 315 ITR 102 (Karnataka) wherein also it has been stated that it is not a penalty. Another decision stated is *Bennett Coleman & Co Ltd versus ITO* 157 ITR 812 which also speaks that the interest chargeable u/s 201 (1A) is not penal in nature. All other decision also cited in the statement of facts are also on the same line. However, here after considering all the above decision disallowance is confirmed for the reason that such payment is not business expenditure. Therefore it is not allowable as deduction u/s 37 (1) of the act as it is not wholly and exclusively incurred for the purposes of the business. The lower authorities have merely stated that it is not an allowable expenditure. Further other decisions cited by the assessee stating that above interest is compensatory in nature have already been dealt with by the honourable whether a High Court in the above decision. In view of this none of the decision cited by the assessee in statement of facts supports the view of the assessee that above expenditure is allowable u/s 37 (1) of the act. Even assuming meanwhile denying, that above interest expenditure is compensatory in nature, it should be allowed as allowable expenditure. The conditions of the allowability of expenditure is laid down u/s 37 (1) of the income tax act which speaks that any expenditure which is not a capital expenditure or personal expenses of the assessee which is laid out or expended wholly and exclusively for the purpose of the business shall be allowed in computing the income chargeable Under the head profits and gains of business or profession. Payment of interest on late payment of TDS cannot be considered as an expenditure led out or expended wholly and Page | 4 exclusively for the purpose of the business because late payment of TDS cannot be considered as part of the business of the assessee.

10. In view of the above facts we hold that payment of interest on late deposit of tax deduction at source by the assessee leviable u/s 201 (1A) of the act is neither an expenditure only and exclusively incurred for the purpose of the business and therefore same is not allowable as deduction u/s 37 (1) of the act. In view of this, various grounds raised by the assessee on this in the issue are dismissed.”



9.3 The Hon'ble Madras High Court in CIT Vs. Chennai Properties & Investment Ltd. (1999) 239 ITR 435 (Mad.) has held that interest under section 201(1A) paid by the assessee does not assume the character of business expenditure and also cannot be regarded as compensatory payment. The decision of Hon'ble Madras High Court has also been followed by various benches of Tribunal including, in Velankani Information Systems Limited Vs. DCIT [2018] com 599 (Bangalore- Trib.) Further, the Co-ordinate Bench of ITAT Bangalore in the case of Jindal Aluminium Limited ITA No. 31/Bang/2019 in similar facts held interest on TDS as ineligible for business expenditure. Hence, we have no hesitation to hold that interest payment on late payment of TDS is neither compensatory in nature nor eligible as business expenditure for deduction , therefore, the same is not allowable as deduction u/s 37(1) of the Act. Accordingly, we uphold the order of the Ld. CIT(A) on the issue-in-dispute. The ground No. 3 of the appeal of the assessee is accordingly dismissed.

10. In the result, the appeal of the assessee is partly allowed for statistical purposes.

Order pronounced in the open Court on 20/12/2024.

**Sd/-
(RAJ KUMAR CHAUHAN)
JUDICIAL MEMBER**

**Sd/-
(OM PRAKASH KANT)
ACCOUNTANT MEMBER**

Mumbai;
Dated: 20/12/2024



Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER,
(Assistant Registrar)
ITAT, Mumbai