IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH: BANGALORE

BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND
SMT. BEENA PILLAI, JUDICIAL MEMBER

ITA No.34/Bang/2023
Assessment Year: 2014-15

M/s. Expat Engineering India Ltd. Regd. Office Carlton Towers, A Wing, 3rd Floor, Unit No.301-3-314 No.1 Old Airport Road Bangalore 560 008 **PAN NO : AABCE9003D**	**Vs.**	ACIT Circle-2(1)(2) Bangalore
APPELLANT		**RESPONDENT**

Appellant by	:	Shri Ravi Shankar, A.R.
Respondent by	:	Shri Parithivel, D.R.

Date of Hearing	:	31.10.2023
Date of Pronouncement	:	09.11.2023

O R D E R

PER CHANDRA POOJARI, ACCOUNTANT MEMBER:

This appeal by assessee is directed against order of NFAC passed u/s 250 of the Income-tax Act,1961 ['the Act' for short] for the assessment year 2014-15 dated 2.12.2021. The assessee has raised following grounds:

1. *The impugned order passed by the learned Commissioner of Income Tax (Appeals) under section 250 of the Income Tax Act, 1961 (Act) to the extent which is against the Appellant is opposed to law, weight of evidence, probabilities, facts and circumstances of the case.*

2. *The assessment order passed by the learned assessing office u/ s 143(3) of the Act in s it is prejudicial to the interest of the appellant is bad, erroneous in law and contrary to the facts and circumstances of the case and the learned Commissioner (Appeals) erred in upholding the same.*

3. *The Officers below failed to appreciate that the interest paid on late payment of TDis not being in the nature of penalty and hence disallowance of same is unwarranted and uncalled for in the facts and circumstances of the case.*

4. *The learned officers below erred by not considering the submissions made by the appellant that the interest on late payment of TDS paid u/ s 201/ 201(1A) is an allowable expenses.*

5. *The Officers below failed to appreciate that the Appellant is adhering to the Revenue recognition Policy as mandated in Accounting Standard 7 and revenue is recognized in the of accounts based on the Percentage Completion Method and revenue is never recognised based on Form 26AS.*

6. *The Officers below erred in law and fact in restricting TDS credit under the facts and circumstances of the case.*

7. *That Officers below erred in the computation by adopting the figures incorrectly and hence the consequential demand is liable to be annulled.*

8. *The Appellant submits that each of the above grounds are mutually exclusive and without prejudice to one another.*

9. *The Appellant craves leave to add, alter, amend, vary, omit or substitute any of the aforesaid grounds of objection at any time before or at the time of hearing before the Honourable Income Tax Appellate Tribunal (Tribunal'), so as to enable the Hon'ble Tribunal to decide on the appeal in accordance with the law. For these and other grounds that may be urged at the time of hearing of appeal, the Appellant prays that the appeal may be allowed for the advancement of substantial cause of justice and equity.*

2. The assessee has raised additional grounds as follows:

1. *<u>In respect of admission made in survey:</u>*

   i. *The order of assessment passed by the learned assessing officer under section 143[31 of the Act and confirmed by the learned Commissioner of Income-tax [Appeals] is incorrect as making the addition of Rs.1,42,00,000/- in respect of income which is said to be admitted in survey proceedings is incorrect under the facts and circumstances of the case.*

   ii. *The officers below after noting that the income so admitted in survey pertains to the earlier AY 2013-14 and the succeeding AY 2014-15, erred in making the addition in the current AY 2014-15.*

   iii. *The officers below after noting that the income so admitted in survey pertains to the other companies of the group, erred in making the addition in the hands of the Appellant, when each companies distinct and independent existence in the eyes of law.*

iv. The officers below after noting that the income so admitted in survey pertains to non-inclusion of legal and professional expenditure as part Work in Progress, when the whole exercise is revenue neutral, erred in making the addition for the current year as she failed to grant corresponding deduction for the work in progress in the subsequent year when the income was subjected to tax.

2. *In respect of the denial of TDS credit:*

The lad. Assessing Officer in the scrutiny order while denying the TDS credit stated that TDS Credit which is denied in the current year can be claimed in the year in which the related income has been offered to tax. But the Officers below erred by not granting the TDS credit of Rs.41,74,121/- collected by the Government during the current year, though the Appellant so far has already offered the 100% of the revenue from the relevant projects but the Ld. AO has never granted the TDS credit in any of the assessment years and hence the action of the Officers below is resulting in unjust enrichment, taxing the same income twice over, opposed to the principles of taxation and equity.

3. *In respect of interest u/ s 234A, 234B, 234D:*

Without prejudice to the right to seek waiver with the Hon 'ble Chief Commissioner of Income Tax/ Director General of Income Tax under the provisions of the Act and as confirmed by the CBDT Circular No. 400/234/95IT (B) dated 23/05/ 1996, the Appellant Company denies itself liable to be charged to interest under section 234A, 234B and 2341) of the Act which under the facts and circumstances bf the case deserves to be cancelled. The calculation of interest under section 234A, 234B and 234D is not in accordance with law as the rate, amount and method for calculating interest is not discernible from the order of assessment.

4. *The Appellant craves leave to add, alter, amend, substitute, change and delete any of the grounds of appeal.*

5. *For the above and other grounds that may be urged at the time of hearing of the appeal, the Appellant prays that the appeal may be allowed and justice rendered.*

3. At the outset, it is observed that the appeal has been filed by the assessee on 23.1.2023. The appellate order has been received by the assessee on 2.12.2021. The time limit to file appeal before this Tribunal is 60 days from the date of receipt of the order of the NFAC. Hence, there was a delay of 351 days in filing the appeal before this Tribunal. The delay between 2.12.2021 to 29.5.2022 i.e. 178 days is

covered by the order of Hon'ble Supreme Court in Miscellaneous Application No.665 of 2021 and 21 & 29 of 2022 in SMW(C) No.3 of 2020, dated 10.1.2022, the intervening period has been excluded while computing the limitation period as per Para 5.III as under:

> *"In cases where the limitation would have expired during the period between 15.3.2020 till 28.2.2022, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 1.3.2022. In the event the actual balance period of limitation remaining with effect from 1.3.2022 is greater than 90 days, that longer period shall apply.:"*

3.1 In view of this, the assessee s required to explain the balance period of delay of 173 days. The assessee explained that this appeal was handled by assessee's Chartered Accountant Late Shri Nagendran, who was expired due to onset of Covid-19 Pandemic Delta Variant on 25.4.2021. Later, the case has been handed over by his family members to one CA Shri Vijendra Rao and he left the case in midway in November, 2021. Meanwhile, the order has been passed by NFAC and nobody was there to look after this case. Finally, assessee came to know about the disposal of the case only on 14.1.2023 when assessee consulted new CA Shri Rajgopal, who represented the case before this Tribunal for the assessment year 2017-18 who observed from the portal that the case of the assessee for the AY 2014-15 has been completed. Thereafter, he downloaded the order passed u/s 250 of the Act by NFAC and taken the measures to file the appeal before this Tribunal. Thus, there was another delay of 173 days after Covid period in filing the appeal before this Tribunal.

4. We have heard the rival submissions and perused the materials available on record. In our opinion, the reason stated by the assessee in his petition accompanied by the affidavit is bonafide reason and we find that there is a good and sufficient reason in filing the appeal belatedly before this Tribunal. Considering the facts and circumstances of the case, we admit the appeal for adjudication.

5. Now coming to the admission of additional grounds, in our opinion, all the facts are already on record and there is no necessity of investigation of any fresh facts for the purpose of adjudication of above additional grounds. Accordingly, by placing reliance on the judgement of Hon'ble Supreme Court in the case of NTPC Vs. CIT 229 ITR 383 (SC), we inclined to admit the additional grounds for the purpose of adjudication as there was no investigation of any fresh facts otherwise on record and the action of the assessee is bonafide.

Main Grounds:

6. Ground Nos.1, 2, 8 & 9 are general in nature, which do not require any adjudication.

7. Ground Nos.3 & 4 are reproduced as under:

> 3. *The Officers below failed to appreciate that the interest paid on late payment of TDis not being in the nature of penalty and hence disallowance of same is unwarranted and uncalled for in the facts and circumstances of the case.*
>
> 4. *The learned officers below erred by not considering the submissions made by the appellant that the interest on late payment of TDS paid u/ s 201/ 201(1A) is an allowable expenses.*

7.1 After hearing both the parties, we are of the opinion that similar issue came for consideration before this Tribunal in assessee's own case in ITA No.503/Bang/2022 the Tribunal vide order dated 1.8.2022 held as under:

11. We have considered the rival submissions and perused the material on record. The coordinate Bench of this Tribunal in Velankani Information Systems Ltd. (supra) dealt with this issue and held that interest on delayed payment of TDS cannot be allowed as deduction. The relevant observations of the Tribunal are as follows:-

> *"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. Incometax 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 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."

12. *Following the above decision of the Tribunal, we hold that interest on delayed payment of TDS is not an allowable deduction and dismiss the ground raised by the assessee. The ld. AR submitted a detailed written submission on various case laws which we will discuss in the ensuing paras.*

13. *At the outset it has to be mentioned that the question whether interest paid u/s.201(1A) of the Act, is an allowable business expenditure has to be examined within the parameters of Sec.37(1) of the Act and not on the basis of the prohibition contained in Sec.40a(ii) of the Act. Sec.37(1) of the Act provides that expenditure which is not capital or personal in nature laid out or expended wholly and exclusively for the purpose of business shall be allowed in computing the income chargeable under the head "profits and gains of business or profession". Sec.40(ii) provides that any sum paid on account of any rate or tax levied on the profits and gains of any business or profession or assessed at a proportion of, or otherwise on the basis of any such profits or gains, shall not be deducted in computing the income chargeable under the head "profits and gains of business or profession". Both these sections operate in different fields, the former is an enabling provision while the latter is a disabling provision.*

14. *The question directly arose for consideration before the Hon'ble Supreme Court in the case of Bharat Commerce and Industries Ltd. v. CIT [1998] 230 ITR 733 and the question that was considered by the Hon'ble Supreme Court in that case was whether 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. The exact question considered by the Hon'ble Court was:-*

"Whether on the facts and in the circumstances of the case the claim for deduction of interest levied under Section 139 to the extent of Rs. 11,470/- and interest levied under Section 215 to the extent of Rs. 1,04,339/- was rightly rejected as not allowable under Section 37 of the Income-Tax Act, 1961 for the assessment year 1972-73?"

15. *The Hon'ble Court held as follows:*

"It cannot be said, in the present case, that the payment of interest is in any way an expense incurred wholly or exclusively for the purpose of

assessee's business. Nor is it a payment made for the purpose of preserving and protecting the assessee's business as in the case of Birla Cotton Mills (supra).

Apart from section 37, the assessee has also present into service Section 36(1) (iii) which permits deduction in respect of the amount of interest paid in respect of capital borrowed for the purposes of the assessee's business or profession. For the reasons set out earlier, the claim for deduction under section 36(1)(iii) is also misconceived just as the assessee's claim under section 37 is misconceived.

In the premises, the question raised has to be answered in favour of the revenue and against the assessee. The appeals are, therefore, dismissed with costs."

16. *Therefore it is clear that the basis why tax or interest is not allowed as deduction u/s.37(1) of the Act is on the reasoning that it cannot be regarded as an expense incurred wholly or exclusively for the purpose of Assessee's business. Therefore the allowability of interest on taxes paid should not be looked out from the definition of tax as given in Sec.2(43) of the Act. The submissions made by the learned counsel for the Assessee are based on a misconception that the definition of interest u/s.2(43) of the Act is relevant and that the disallowance in question has to be judged in the parameters of Sec.40(a)(iib) of the Act. We shall now deal with the various submissions made by the learned counsel for the Assessee.*

17. *In the case of HarshadShantilalMehta vs Custodian, (1998) 231 ITR 871 (SC) the Supreme Court was concerned with the interpretation of Sec.11 of The Special Court (Trail of Offenders Relating Transactions in Securities) Act, 1992, (hereinafter referred to as the Special Act) which reads thus:-*
"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 Sec.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 of financial institution or mutual fund; and
(c) any other liability as may be specified by the Special Court from time to time."

18. *The Hon'ble Supreme Court framed the following questions for consideration:-*

(1) *What is meant by revenues, taxes, cesses and rates due?*

Does the word "due" refer merely to the liability to pay such taxes etc., or does it refer to a liability which has crystalised into a legally ascertained sum immediately payable?

(2) *Do the taxes (in clause (a) of Section 11(2) refer only to taxes relating to a specific period or to all taxes due from the notified person?*

(3) *At what point or time should the taxes have become due?*

(4) *Does the Special Court have any discretion relating to the extent of payments to be made under Section 11(2)(a) from out of the attached funds/property?*

(5) *Whether taxes include penalty or interest? …..*

19. *While answering Question No.5, the Court held:-*

> *"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 Income Tax Act. Tax, penalty and interest are different concepts under the Income Tax 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 61 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."*

20. *As can be seen from the issue involved in the aforesaid case, it was a case where the Hon'ble Court had to decide whether interest liability is also liability within the meaning of Sec.11(2)(a) of the Special Act. The aforesaid decision rendered in a different context cannot be extended to the provisions of Sec.37(1) of the Act and hence the aforesaid decision is not of any relevance to the issue in this appeal. In assessee's case the issue under consideration is the allowability of interest u/s.201(1A) as deduction u/s.37(1) of the Act and therefore the decision of the Hon'ble Supreme Court can be applied.*

21. *The next case referred is Arthur Anderson & Co vs ACIT (2010) 324 ITR 240 (Bombay). The issue considered in that case was with regard validity of initiation of reassessment proceedings u/s.147 of the Act. The Court found that material on the record before the Court showed that in the statement of total income the assessee had disclosed an interest income of Rs.50.14 lacs as income from other sources. In the note appended to the statement of computation, under the heading 'interest income' the assessee stated that this represented interest received under Section 244-A of the Income Tax Act, 1961 net of interest paid under Section 220, based on the ratio of certain judgments. The Court held that it cannot be stated that there was a failure on the part of the assessee to fully and truly disclose all the material facts relating to the assessment. Incidentally, they also observed as follows:-*

"9. Apart from the fact that there has been no failure on the part of the assessee to make a full and true disclosure of all material facts, it will be necessary to advert to the decision of the Supreme Court in Harshad Shantilal Mehta v. Custodian the Supreme Court, in the course of its judgment observed that under the Income Tax Act, 1961 the definition of tax under Section 2(43) does not include penalty or interest and that the concepts of tax, penalty and interest are different concepts under the Act. Justice Sujata Manohar speaking for a Bench of three Learned Judges of the Supreme Court observed thus :

"We are concerned in the present case with penalty and interest under the Income-tax Act. Tax, penalty and interest are different concepts under the Income-tax Act. The definition of "tax" under section 2(43) does not include penalty or interest. Similarly, under section 156, it is 2 (1998) 231 ITR 871. provided that when any tax, interest, penalty, fine or any of 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. The provisions for imposition of penalty and interest are distinct from the provisions for imposition of tax."

10. The decision of the Supreme Court was delivered in an appeal which arose out of the Special Court (Trial of Offences Relating to Transaction in Securities) Act, 1992. The interpretation which has been placed on the provisions of Section 2(43) and the observations of the Supreme Court noted earlier, however, bind this Court as regards the ground on which the reopening of the assessment has been sought in this case."

22. *It can thus be seen that the aforesaid observations were in a different context of full and fair disclosure of material facts and the ratio cannot be extended to the allowability of deduction u/s.37(1) of the Act.*

23. *In the case of CIT vs Oryx Finance & Investment (P) Ltd (2017) 83 taxmann.com 194 (Bombay) it was held that for the purpose of penalty u/s.221 "tax in arrears" would not include interest payable u/s.220(2) and*

not applicable to allowing interest paid u/s. 201(1A) of the Act as deduction u/s.37(1) of the Act.

24. *The case of Maganbhai Hansrajbhai Patel vs ACIT [2012] 26 taxmann.com 226 (Gujarat) is again a case on interpretation of Sec.2(43) of the Act, which we have already distinguished in the earlier part of this order.*

25. *The learned counsel for the Assessee has also placed reliance on the following decisions, viz., Director of Income Tax vs Italian Thai Development Co. Ltd (2012) 17 taxmann.com 172 (Delhi Trib) & (2014) 45 taxmann.com 61 (Delhi HC), wherein the disallowance u/s.40(a)(ii) was deleted on the basis that the gross amount including the tax is to be allowed. The next case quoted in DCIT vs Karan Johar (2011) 11 taxmann.com 268 (Mumbai) was also a case of allowability u/s.40(ii) of the Act. We have in the earlier part of this order already held that the question whether interest paid u/s.201(1A) of the Act is an allowable business expenditure has to be examined within the parameters of Sec.37(1) of the Act and not on the basis of the prohibition contained in Sec.40a(ii) of the Act. Sec.37(1) of the Act provides that expenditure which is not capital or personal in nature laid out or expended wholly and exclusively for the purpose of business shall be allowed in computing the income chargeable under the head "profits and gains of business or profession". Sec.40(ii) provides that any sum paid on account of any rate or tax levied on the profits and gains of any business or profession or assessed at a proportion of, or otherwise on the basis of any such profits or gains, shall not be deducted in computing the income chargeable under the head "profits and gains of business or profession". Both these sections operate in different fields, the former is an enabling provision while the latter is a disabling provision. Therefore these decisions do not help the plea raised by the Assessee in this appeal.*

26. *The ld AR has quoted the following two decisions stating that there exists differentiation between the term 'Tax' used in 40(a)(ii) and 'Other Contractual obligations' parity of the same equally applies to differentiate the term 'tax' and expression 'interest' and to state that all the payments made to Government account would not partake the character of levy of taxes. We will first look at under what context these decisions have been rendered.*

27. *In Kerala State Beverages Manufacturing & Marketing Corporation Ltd. Vs ACIT [2022] 134 taxmann.com 11 (SC), the decision is rendered by the Hon'ble supreme Court in the context of allowability of Gallonage fee, licence fee and shop rental (kist) incurred towards retail trading of foreign liquor and therefore in a completely different context that cannot be equated to assessee's case.*

28. *In Krishna Bhagya Jala Nigam Ltd vs ACIT [2022] 134 taxmann.com 101 (Bangalore - Trib.) it was held that guarantee commission was paid in consideration for State Government agreeing to suffer a detriment in event*

of assessee not repaying loan guarantee commission was not in nature of a 'levy' on a State Government undertaking by State Government and it was purely a contractual payment and did not fall within purview of section 40(a)(iib).

29. *We have in the earlier part of this order already held that the question whether interest paid u/s.201(1A) of the Act is an allowable business expenditure has to be examined within the parameters of Sec.37(1) of the Act and not on the basis of the prohibition contained in Sec.40a(ii) of the Act. Sec.37(1) of the Act provides that expenditure which is not capital or personal in nature laid out or expended wholly and exclusively for the purpose of business shall be allowed in computing the income chargeable under the head "profits and gains of business or profession". Sec.40(ii) provides that any sum paid on account of any rate or tax levied on the profits and gains of any business or profession or assessed at a proportion of, or otherwise on the basis of any such profits or gains, shall not be deducted in computing the income chargeable under the head "profits and gains of business or profession". Both these sections operate in different fields, the former is an enabling provision while the latter is a disabling provision. Therefore these decisions do not help the plea raised by the Assessee in this appeal.*

30. *The ld AR also submitted that any sum paid referred in section 40(a)(ii) must be viewed from the perspective of only assessee whose payer and not from the payee perspective. The tax payment made on the profits earned by the assessee must not be enlarged to include even assessees vendor perspective. When TDS itself is not disallowed in the payees hands interest so paid u/s. 201(1A) cannot be disallowed u/s.40(a)(ia). In our considered view, this contention of the ld AR is completely out of context, as we have already held that Sec.40(a)(ii) is not relevant to the present issue before us at all.*

31. *The ld AR relied on the following judgments to substantiate the claim that the interest u/s.201(1A) is compensatory in nature. The Hon'ble Supreme Court CIT vs Eli Lilly & Co. (India) (P.) Ltd [2009] 312 ITR 225 (SC) was rendered in the context of period up to which interest u/s.201(1A) is to be calculated and in that regard held that interest under section 201(1A) is a compensatory measure for withholding the tax which ought to have gone to the exchequer. The decision of Hon'ble Karnataka High Court in CIT TDS vs Bharat Hotels Ltd [2015] 64 taxmann.com 325 (Karnataka) was also rendered in the context of period interest calculation u/s.201(1A) and in that perspective held that "Interest, herein, being compensatory in nature, cannot be, thus, charged for the period beyond the date when such tax has already been deposited by the recipient". The decision in the case of CIT vs Oriental Insurance Company Ltd., [2009] 183Taxman186 (Karnataka), the decision of the Tribunal holding that the interest u/s.201(1A) is penal in nature and cannot be levied was reversed by the Hon'ble Karnataka High Court to hold that levy of interest u/s.201(1A) cannot be construed as penalty and has to be paid for failure on the part of the assessee to deduct tax at source.*

32. *In all these judgments, the issue under consideration was the mode of computation of interest u/s.201(1A) and in that context, courts have held that it is compensatory in nature. In none of these decisions the issue of allowability of interest delayed payment of TDS as business expenditure arose and hence have no nexus to the assessee's case.*

33. *The ld AR relied on the following decisions to submit that compensatory payment should be allowed as a business expenditure u/s.37(1).*

(i) *P. Venganna Setty (2021) 133 taxmann.com 368 (Bang Trib)*

(ii) *Mandya National Paper Mills Ltd (1985) 20 Taxmann 231 (Karnataka)*

(iii) *Lachmandas Mathuradas (2002) 122 Taxmann 828 (SC)*

34. *The circumstance in which the interest u/s.201(1A) is held to be compensatory is discussed in the above paras and therefore the submission of allowability of interest u/s.201(1A) on that basis is not tenable. Besides the above, the law laid down by the Hon'ble Supreme Court in the case of Bharat Commerce (supra) in the context of allowability of interest as deduction u/s.37(1) of the Act, will be applicable in the present case.*

35. *The ld AR submitted that the words used in 40(a)(ii) 'tax levied on the profits' does not refer to interest paid on the TDS and that the when the language is clear and unambiguous literal interpretation of the words must be made. In this regard the ld AR relied on the decision Exide Industries Ltd., (2020) 116 Taxmann.com 378 (SC). Further it was submitted that legislative casus omissus cannot be supplied by judicial interpretative process and relied on the following decisions in this context :-*

(i) *Ajmera Housing Corpn (2010) 193 Taxman 193 (SC)*

(ii) *Velliappa Textiles Ltd (2003) 132 taxman 165 (SC)*

(iii) *Babita Lila (2016) 73 taxmann.com 32 (SC)*

36. *In our considered view this contention of the ld AR is completely out of context as we have already held that Sec.40(a)(ii) is not relevant to the present issue before us at all. Moreover, the levy of interest on delayed payment of TDS u/s.201(1A) though held to compensatory in nature, the allowability of the same cannot be decided simply based on that. The levy of 201(1A) is a levy for delay in the remittance of tax that is deducted and not paid into the government account and is levied towards the use of funds belonging to the exchequer. The interest u/s.201(1A) can be equated to the levy of interest u/s.234. Interest u/s.234 is a levy on delay in the payment of income tax and the TDS is nothing but the income tax paid on behalf of the*

payee and therefore the interest on the same u/s.201(1A) is also in the nature of interest levied on the income tax. On that count also interest on delayed payment of TDS cannot be claimed as a deduction.

37. *The ld AR quoted several decisions with regard to the allowability of cess which is not a settled position that cess is not an allowable deduction and hence we are not going into the submissions made in this regard.*

38. *The next contention of the ld AR is that the 'tax' used in 40(a)(ii) is to be considered as the tax on the total income of the assessee himself. In our considered view this contention of the ld AR is completely out of context as we have already held that Sec.40(a)(ii) is not relevant to the present issue before us at all. Besides the above, the decision of the Madras High Court in the case of Chennai Properties (supra) settles the issue.*

39. *The ld AR submitted the decision of the Madras High Court in the case of Standard Polygraph Machines (2002) 124 Taxman 669 (Madras) stating that the same judge who authored the decision of Chennai Properties (supra) had in 2002 authored this decision where it was held that the TDS amount on paid on account of contractual obligation will not take colour of tax and hence to be treated as expenditure. This submission of ld AR is a complete misunderstanding of the facts of the case where the TDS is paid by the assessee as part of a contractual obligation over and above the contractual amount and therefore was treated as a business expenditure. This is interpreted out of context by the ld AR to state that TDS is not a tax but an obligation which in our view is illogical.*

40. *The ld AR submitted the below decisions of Tribunal where interest on delayed payment of TDS is allowed as a deduction. However following the Doctrine of Stare Decisis, we are bound by the decision of Hon'ble High Court and therefore the below decisions cannot be followed in assessee's case*

(i) *Resolve salvage & Fire India (P) Ltd (2022) 139 taxmann.com 196 (Mum.Trib)*

(ii) *STUP Consultants Pvt Ltd (ITA No5827/Mum/2012 dt 11.12.2018*

(iii) *Narayani Ispat (P) Ltd (ITA 212/Kol/2014 dt 30.08.2017*

(iv) *Sai Food Products (ITA 1887/Kol/2016 dt 06.04.2018*

(v) *IDS Next Business Solutions (P) Ltd (ITA 510/Bang/2018 dt 15.06.2018*

(vi) *Rungta Mines Ltd (ITA 1531/Kol/217 dt 05.10.2018*

41. *Though there is a decision of the coordinate bench of the Tribunal, we have followed the decision of the Hon'ble High Court following the rule of judicial discipline as has been held in the case of CIT v. Godavari Devi Saraf (113 ITR 589) where the Hon'ble Bombay High Court has held that -*

"Until contrary decision is given by any other competent High Court, which is binding on a Tribunal in the State of Bombay, it has to proceed on the footing that the law declared by the High Court, though of another State, is the final law of the land."

42. *The ld AR also made a submission drawing the comparison of the provisions of section 40(a)(ii) and section 179 to state that when terms are clearly defined by the Parliament, enlarging the scope of the section by importing the provisions from other parts of the Act is incorrect. In this regard the ld AR relied on the decision in the case of HCL Technologies Ltd (2018) 93 taxmann.com 33 (SC). The ld AR failed to note the key distinction between these two sections. Section 179 is a provision for recovery from the directors of a private company and in that context the legislature has defined the word 'tax due' . As we have already held that Section 40(a)(ii) is not applicable to the present case at all, we are of the view that the contentions raised in this regard are untenable."*

7.2 In view of the above order of the Tribunal, taking a consistent view, these ground Nos.3 & 4 of the appeal of the assessee are dismissed.

8. Next ground Nos.5, 6 & 7 are reproduced below:

5. *The Officers below failed to appreciate that the Appellant is adhering to the Revenue recognition Policy as mandated in Accounting Standard 7 and revenue is recognized in the of accounts based on the Percentage Completion Method and revenue is never recognised based on Form 26AS.*
6. *The Officers below erred in law and fact in restricting TDS credit under the facts and circumstances of the case.*
7. *That Officers below erred in the computation by adopting the figures incorrectly and hence the consequential demand is liable to be annulled.*

8.1 The grievance of the assessee in these ground is with regard to non-giving of full TDS credit u/s 199 of the Act read with Rule 37 of the I.T. Rules. The contention of the assessee is that TDS has been deducted not only on gross receipts of sale but also on mobilization

advances and advance bill raised. But such advances are running bills raised by assessee which are not the sale receipts in the assessment year under consideration spread to more than 1 assessment year and the assessee has already offered the income emanated from these receipts in earlier assessment year or subsequent assessment years but corresponding TDS has not been given.

9. The ld. D.R. submitted that a perusal of the assessment order shows that this contention of the assessee is actually accepted by the A.O. in principle. The AO accepts that the mobilization advance etc. is spread over several years and should accordingly be taxed spread over those very years. But if that is the case, the assessee cannot take credit of the entire TDS in one year itself. If the income is being declared over several years on pro-rata basis, then naturally the TDS credit should be claimed over those very years. This is what Rule 37BA prescribes — viz. credit for TDS shall be allowed across those years in the same proportion in which the income is assessable to tax. In view of the above facts, he submitted that the assessee's contention cannot be accepted and the action of the A.O. in restricting the TDS claim on pro-rata basis to the income declared be upheld and the assessee's appeal be dismissed on this issue.

10. We have heard the rival submissions and perused the materials available on record. The grievance of assessee herein is that the ld. AO has not given full TDS credit which is displayed in Form 26AS. He has given TDS credit proportionately on pro rata basis to the extent of income declared by the assessee. The contention of the assessee is that the TDS has been made not only on the sales receipts made in these assessment years but it also includes mobilization advances and running bills raised by the assessee which is not subject matter of the taxation in the assessment year under consideration that income was offered for taxation in subsequent assessment years. In our opinion, these facts

are to be examined by the ld. AO after assessee furnishing and reconciling the offering of these receipts to taxation in different assessment years and the assessee shall not claim the TDS credit in more than one assessment year in respect of the TDS deducted and reflect in form No.26AS. Accordingly, this issue is remitted to the file of ld. AO for fresh consideration to carry out necessary enquiry on this regard.

Additional grounds:

11. Ground Nos.1, 1(i), 1(ii), 1(iii) & 1(iv) are with regard to **addition of Rs.1.42 crores which is admitted as income during the course of survey proceedings.**

11.1 The contention of the ld. A.R. is that there was no corroborative material supporting this addition and admission made by assessee in the sworn statement recorded during the course of survey cannot be basis for addition and prayed that same to be deleted. Further, it was submitted that even if it is considered as addition in this assessment year under consideration, which is relating to work-in-progress and that work in progress shall be the opening work in progress in the next assessment year 2015-16 and prayed that appropriate direction may be given.

11.2 He submitted that the learned assessing officer has placed reliance upon the sworn statement (filed by the revenue during the hearing) to make addition of Rs. 1.42 crores on the premise that the same was on account of;

a) Cross charge of common expenditure (Marketing and Admin) not considered for AY 2013-14 and 2014-15, and

b) Legal expenditure was to be treated as WIP (To be carried forward) and not revenue expenditure.

11.3 In this regard, the ld. A.R. submitted that the addition based solely on the basis of a sworn statement, which is contrary to the audited financials and which does not have evidentiary value, shall

not be the sustained as it is not based upon any deficiency, which would require additions to income. The assessee placed reliance upon the decision in CIT v S Khader Khan Son 352 ITR 480 (SC). Without prejudice, it is settled position of law that "consent does not confer jurisdiction". The work sheet of the said expenditure is stated at question 7 of the sworn statement and the chart has been appended in respect of " legal and professional charges debited to P & L acçount can be transferred to WIP' of Rs. 1.42 crores. The ld. A.R. submitted that the total Legal expenditure incurred is only Rs. 44,89,312/- (Sch — 21 — Other Expenses) and thus the debit to the profit and loss account, to be transferred to the WIP could not have been above the expenditure incurred. The inference that the entire amount of Rs. 44,89,312/- was to be transferred to WIP was bad in law and on fact. The premise that the additional income offered was to be blindly accepted without there being any claim of expenditure to the extent of income offered, is bad in law. Without further prejudice and not conceding that the whole exercise is revenue neutral, since the WIP is to be allowed as cost of construction in a later year, the additional income to any extent in the present year, will reduce the income in a later year. Without further prejudice, the ld. A.R. submitted that the additions if any shall be restricted to Rs.44,89,312/- in the present assessment year and a direction may be given that the same amount be reduced from its returned income in the following assessment year.

12. On the other hand, the ld. D.R. submitted that during the course of survey, there was survey in case of assessee and statement u/s 131 of the Act was recorded from Shri Santosh Shetty, Managing Director of assessee company on 22.1.2016. According to the statement, he offered additional income in these assessment and the capital asset charged to the P&L account as an expenditure, though it was a capital expenditure, which is as follows:

Financial Year	Amount
2012-13	Rs.47.84 Lakhs
2013-14	Rs.142 Lakhs
2014-15	Rs.9.37 Lakhs
2015-16	Rs.25 Lakhs

12.1 According to the ld. D.R., it is not correct to state that there was no material to support the addition of Rs.1.42 crores. He submitted that the assessee has wrongly treated the capital expenditure as a revenue expenditure and charged to the P&L account and admitted to reduce the tax liability of the assessee for claiming excess expenditure, which is not wholly and exclusively incurred for the purpose of business and same has been unearthed by the survey team and consequent to the unearthing by the survey team, the assessee has admitted the above addition of Rs.1.42 crores and same to be sustained.

13. We have heard the rival submissions and perused the materials available on record. In this case, there was a survey at the business premises of the assessee. Statement was recorded u/s 139(1) of the Act from the Chairman and Managing Director of assessee company on 22.1.2016 and during the course of survey, he stated that he answered to question No.9 as follows:

"9. Are the above-mentioned expenses incurred in the case of M/s. Expat Properties India and Expat Engineering India Ltd. also? Have you taken it as work-in-progress or debited it in P&L account, Please explain.

Ans: Expenses incurred as compensation have been debited to Profit and Loss account in the case of EPIL also. We are herewith offering this additional income to taxation as follows:

FY 2012-13	*-Rs.12.76 lakhs*
FY 2013-14	*-Rs.84.19 lakhs*
FY 2014-15	*-Rs.59.75 lakhs*

In the case of EEIL, legal and professional charges have been incurred towards projects which have been debited to P&L account, and needs to be added back to WIP and we are offering the following additional income to taxation.

FY 2012-13	*-Rs.47.84 lakhs*

FY 2013-14 -Rs.142.00 lakhs
FY 2014-15 -Rs.9.37 lakhs
FY 2015-16 -Rs.25.00 lakhs"

13.1 On the basis of this, the ld. AO made addition of Rs.1.42 crores to the declared income by observing that assessee has overstated the expenditure in P&L account by treating the legal and professional fees, though it was a capital in nature and claimed as a business expenditure in P&L account. Now the argument of ld. A.R. is that the statement recorded during the course of survey cannot be the basis for addition in view of the judgement of Hon'ble Supreme Court in the case of S. Khader Khan & Sons Vs. CIT (352 ITR 480) (SC).

14. We have carefully gone through the above judgement. Originally, this issue came before Hon'ble Madras High Court in the case of CIT Vs. S. Khader Khan & Sons (300 ITR 157), wherein the Hon'ble High Court has held as under:

"An admission is extremely an important piece of evidence but it cannot be said that it is conclusive; and it is open to the person who made the admission to show that it is incorrect.

The word 'may' used in section 133A(3)(iii), viz., 'record the statement of any person which may be useful for, or relevant to, any proceeding under this Act', makes it clear that the materials collected and the statement recorded during the survey under section 133A are not conclusive piece of evidence by themselves. The statement obtained under section 133A would not automatically bind upon the assessee.

Section 133A does not empower any ITO to examine any person on oath. In contradistinction to the power under section 133A, section 132(4) enables the authorized officer to examine a person on oath and any statement made by such person during such examination can also be used in evidence under the Income-tax Act. On the other hand, whatever statement is recorded under section 133A is not given an evidentiary value. The statement obtained under section 133A would not automatically bind upon the assessee.

Therefore, admission made during such statement cannot be made the basis of any admission."

14.1 The same view has been confirmed by the Hon'ble Supreme Court in the judgement cited (supra). We are in full agreement with the above judgement of Hon'ble Supreme Court. However, in the

present case, it is admitted fact that assessee has overstated the expenditure in the P&L account by showing the capital expenditure as revenue expenditure with regard to legal and professional charges by charging the same to the P&L account. By this action assessee overstated the expenditure and understated the income. This fact has been detected in the course of survey u/s 133A of the Act and Chairman and Managing Director of the assessee company has accepted to offer it for taxation. As such, once the Managing Director of assessee company has acknowledged that capital expenditure has been treated as a revenue expenditure and charged to P&L account and stopped further enquiry at the end of department and agreed to offer the same for taxation in these assessment years and never being retracted the same at any assessment stage or first appellate stage, now by way of additional ground before us assessee challenges the same.

14.2 In our opinion, the expenditure has been wrongly accounted in the books of accounts and the same has been accepted by the assessee as wrong and offered it for taxation, which was not open to the assessee to take a reverse stand so as to take benefit of its own mistake. In our opinion, the argument looks contradictive on the face of it.

14.3 On the other hand, on a careful scrutiny of the facts of the case, the ld. AO in this case has given cogent reasons that it has been taxed by disallowing that expenditure in the assessment year under consideration. It is an admitted fact that the assessee has wrongly claimed the expenditure on legal and professional charges and later when it was detected, the same was offered for taxation. Being so, on the appreciation of entire material on record, at this stage, it is not possible to take a different stand by assessee, so as to avoid tax liability. In other words, when the evidence and records disclose that the assessee has wrongly claimed the expenditure in its profit & loss account and accepted the same and when the department has

detected it during the course of survey, now assessee is precluded from denying the tax liability on this count. Accordingly, we do not find any merit on this issue, this ground of appeal is rejected.

14.4 Further, the ld. A.R. alternatively made a plea before us that if it is considered as income in this assessment year under consideration, the same amount is to be considered as a work in progress in subsequent assessment years and corresponding deduction to be given. In our opinion, the Tribunal after giving opportunity of hearing to both the parties to the appeal or pass such order thereon as it thinks fit, the power confines to pass orders on the subject matter of appeal before us and the Tribunal cannot go beyond the scope of appeal and pass an order or give direction, which does not fall within the subject matter of appeal and also the powers restricted to the assessment year under appeal, wherein the appeal relates to assessment year 2014-15, the finding and direction must necessarily be limited to this particular assessment year and we have no jurisdiction to give direction with regard to the proceedings of the earlier assessment year or subsequent assessment year. Being so, we are not in a position to give direction on this issue in subsequent assessment year, which is uncalled for at this stage. Accordingly, all the additional grounds in ground Nos.1, 1(i), 1(ii), 1(iii) & 1(iv) are dismissed.

15. Next additional ground No.2 is with regard to denial of TDS credit.

16. This ground is infructuous in view of our finding in main ground Nos.5 to 7.

17. Next additional ground No.3 is with regard to charging of interest u/s 234A, 234B & 234D of the Act, which is consequential and mandatory in nature and to be charged correctly.

18. Next additional ground Nos.4 & 5 are general in nature, which do not require any adjudication.

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

Order pronounced in the open court on 9th Nov, 2023

Sd/-	**Sd/-**
(Beena Pillai)	**(Chandra Poojari)**
Judicial Member	**Accountant Member**

Bangalore,
Dated 9th Nov, 2023.
VG/SPS

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(Judicial)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Asst. Registrar,
ITAT, Bangalore.