IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH 'A', KOLKATA
(Before Shri A.T. Varkey, J.M. & Dr.A.L.Saini, A.M.)

ITA No. 361/Kol/2019 Asstt. Year : 2014-15

M/s. Emdee Digitronics Pvt. Ltd PAN: AABCE 2934M	Vs	Pr. CIT-4, Kolkata
(Asessee)		(Department)

Assessee by : Shri Siddharth Agarwal,Advocate, ld.AR
Department by : Shri A.K. Nayak, CIT, ld.Sr.DR

Date of Hearing : 11-04-2019		Date of Pronouncement: 28-06-2019

ORDER

Per Dr. A.L.Saini, A.M.:

The captioned appeal filed by the Assessee, pertaining to assessment year 2014-15, is directed against the order passed by the Principal Commissioner of Income Tax, Kolkata under section 263 of the Income Tax Act, 1961, dated 06.02.2019.

2. By way of this appeal, the assessee appellant has challenged correctness of the order dated 06.02.2019, passed by the learned Principal Commissioner of Income Tax, Kolkata under section 263 of the Income Tax Act, 1961, wherein the Pr.CIT held that order passed by assessing officer U/s 143(3), dated 11.05.2016 was erroneous and prejudicial to the interest of the revenue. Grievances raised by the assessee are as follows.

1.For that on the facts and in the circumstances of the case, the order passed by the ld. Principal CIT u/s. 263 of the Act is bad in law and is liable to be quashed.

2.For that the Ld. Principal CIT was not justified in initiating proceedings u/s. 263 inasmuch as it has been held in various decisions that interest on delayed payment of taxes viz. VAT, Service tax and TDS is compensatory in nature and allowable.

3.For that the appellant craves leave to add, alter or delete all or any of the grounds of appeal.

3. The facts of the case may be stated quite shortly as follows: In the instant case, the assessee filed its return of income for the A.Y. 2014-15 on 26.09.2014. Subsequently, the assessee`s case was selected for scrutiny u/s 143(2) of the Income Tax Act, 1961 (hereinafter referred to as "the Act") and assessment was completed under section 143(3) of the Act on 11.05.2016.

Later on, the learned Principal Commissioner of Income Tax, Kolkata exercised his jurisdiction under section 263 of the Income Tax Act, 1961 to revise the order passed by AO under section 143(3) of the Act on the ground that assessee company has debited expenditure under the head Interest on delay payment of VAT, Service Tax and TDS totaling to Rs. 3,45,633/- and since such expenses are penal in nature, is not deductible u/s 37(1) of the I.T Act 1961. However, during the scrutiny assessment u/s 143(3) of the Act, these expenses were allowed as deduction, therefore order passed by the AO is erroneous and prejudicial to the interest of the Revenue. Therefore, ld Pr. CIT issued a show cause notice to the assessee on 16-01-2019 requiring the assessee to submit clarification or explanation to the aforementioned issues and also to show cause why remedial action u/s 263 of the Act would not be taken against the assessment made u/s 143(3) of the Act dated 11.05.2016.

4. In response, the assessee appeared and furnished written submission before Pr.CIT. The relevant portion of the written submission of the assessee is extracted below:-

"That on perusal of your aforesaid notice dated 16.01.2019 and after going through the original assessment order under section 143(3) of IT Act.1961 passed by the Ld. JCIT(OSD), Cir-10(1)/Kol on 11.05.2016, I do hereby admit that the interest amount of Rs. 3,45,633/- debited in the Profit and Loss Account under the garb of belated payment of VAT, Service Tax and TDS are penal in nature and as such should not be allowable under section 37(1) of the IT Act,1961 and should be added back to the returned income of the assessee company.

That admittedly both the assessee and the AO overlooked the said amount during proceedings under section 143(3) of the 1.T Act, 1961 and without adding back the said amount allowed the same fully.

That in the circumstances as above, the assessment order dated: 11.05.2016 passed under section 143(3) of the IT Act, 1961 is erroneous and prejudicial to the interest of revenue and the assessee has no objection if the assessment order dated 11.05.2016 be revised under section 263 of I.T Act, 1961 by your honour considering the statements made in para above."

5. The learned Principal Commissioner of Income Tax, has gone through the reply of the assessee and noticed that assessee has himself confessed and accepted that the he had inadvertently overlooked the matter. It was observed by the Pr.CIT that the assessee had not suo-motto disallowed such expenses being penal in nature and not incidental to the business of the assessee company. Since the assessee had admitted the lapse and had expressed its no objection if the impugned assessment order is revised u/s. 263 of the Act. Since the assessee has also admitted the aforementioned error in the assessment order, therefore, ld Pr.CIT noted that it is a fit case for setting aside the assessment order for limited purpose to rectify the error as brought out above. Also, during the course of assessment proceedings, the Assessing officer had failed to take appropriate measures by disallowing the said expenses (VAT, service tax, TDS) u/s 37(1) of the Act, therefore, Ld. Pr.CIT, held that assessment order passed by AO under section 143(3) dated 11.05.2016 was erroneous and prejudicial to the interest of revenue.

6. Aggrieved by the impugned order of the ld. Pr. CIT, passed u/s. 263 of the Act, the assesse is in appeal before us.

7. The learned Counsel for the assessee submitted that the order passed by the AO is neither erroneous nor prejudicial to the interest of the Revenue. The ld Counsel pointed out that interest on TDS, service tax and VAT are allowable expenditure under section 37(1) of the Act, being compensatory in nature. While making the assessment

U/s 143(3) of the Act, the ld AO has taken a possible view and that is why he allowed interest on TDS, service tax and VAT as expenditure, being compensatory in nature.

8. Before us, the ld. DR for the Revenue has primarily reiterated the stand as taken by the ld. PCIT, which we have already noted in our earlier para and the same is not being repeated for the sake brevity.

9. We have heard both the parties and perused the material available on record. The law with regard to exercise of jurisdiction u/s.263 of the Act on the ground that the AO failed to make enquiries which he ought to have made in the given circumstances of a case is well settled. The Commissioner can regard the order as erroneous on the ground that in the circumstances of the case the Income-tax Officer should have made further inquiries before accepting the statements made by the assessee in his return. The Income-tax Officer is not only an adjudicator but also an investigator. He cannot remain passive in the face of a return which is apparently in order but calls for further inquiry. It is his duty to ascertain the truth of the facts stated in the return when the circumstances of the case are such as to provoke an inquiry. It is because it is incumbent on the Income-tax Officer to further investigate the facts stated in the return when circumstances would make such an inquiry prudent that the word "erroneous" in section 263 includes the failure to make such an enquiry. The order becomes erroneous because such an inquiry has not been made and not because there is anything wrong with the order if all the facts stated therein are assumed to be correct. We derive support for the proposition as stated above from the decision of the Hon'ble Delhi High Court in the case of Gee Vee Enterprises 99 ITR 375 (Del).

10. We note that the assessee company has challenged in the first place, the very usurpation of jurisdiction by ld. Principal CIT to invoke his revisional powers enjoyed u/s 263 of the Act. Therefore, first we have to see whether the requisite jurisdiction necessary to assume revisional jurisdiction is there existing before the Pr. CIT to

exercise his power. For that, we have to examine as to whether in the first place the order of the Assessing Officer found fault by the Principal CIT is erroneous as well as prejudicial to the interest of the Revenue. For that, let us take the guidance of judicial precedence laid down by the Hon'ble Apex Court in Malabar Industries Ltd. vs. CIT [2000] 243 ITR 83(SC) wherein their Lordship have held that *twin* conditions needs to be satisfied before exercising revisional jurisdiction u/s 263 of the Act by the CIT. The twin conditions are that the order of the Assessing Officer must be erroneous and so far as prejudicial to the interest of the Revenue. In the following circumstances, the order of the AO can be held to be erroneous order, that is (i) if the Assessing Officer's order was passed on incorrect assumption of fact; or (ii) incorrect application of law; or (iii)Assessing Officer's order is in violation of the principle of natural justice; or (iv) if the order is passed by the Assessing Officer without application of mind; (v) if the AO has not investigated the issue before him; then the order passed by the Assessing Officer can be termed as erroneous order. Coming next to the second limb, which is required to be examined as to whether the actions of the AO can be termed as prejudicial to the interest of Revenue. When this aspect is examined one has to understand what is prejudicial to the interest of the revenue. The Hon'ble Supreme Court in the case of Malabar Industries (supra) held that this phrase i.e. "*prejudicial to the interest of the revenue*'' has to be read in conjunction with an *erroneous order* passed by the Assessing Officer. Their Lordship held that it has to be remembered that every loss of revenue as a consequence of an order of Assessing Officer cannot be treated as prejudicial to the interest of the revenue. When the Assessing Officer adopted one of the courses permissible in law and it has resulted in loss to the revenue, or where two views are possible and the Assessing Officer has taken one view with which the CIT does not agree, it cannot be treated as an erroneous order prejudicial to the interest of the revenue **"unless the view taken by the Assessing Officer is unsustainable in law".**

11. Taking note of the aforesaid dictum of law laid down by the Hon'ble Apex Court, let us examine whether the order of the Assessing Officer passed order u/s 143(3) of the Act is erroneous and prejudicial to the interest of Revenue. Since in the present case the Pr. CIT has exercised jurisdiction u/s.263 of the Act on the ground that the assessee has himself confessed and accepted that the VAT, service tax, TDS etc. expenses are not allowable expenditure under section 37(1) of the Act. Therefore, it was observed by the Pr.CIT that the assessee had not suo-motto disallowed such expenses (VAT, service tax, TDS etc.) being penal in nature and not incidental to the business of the assessee company. Since the assessee has also admitted the aforementioned error in the assessment order therefore, ld Pr.CIT noted that it is a fit case for setting aside the assessment order for limited purpose to rectify the error as brought out above. Also, during the course of assessment proceedings, the Assessing officer had failed to take appropriate measures by disallowing the said expenses (Interest on late deposit of VAT, service tax, TDS) u/s 37(1) of the Act, therefore, Ld. Pr.CIT, held that assessment order passed by AO under section 143(3) dated 11.05.2016 was erroneous and prejudicial to the interest of revenue.

We note that there is no estopple against the law. What is not otherwise taxable cannot become taxable because of admission of assessee. Nor can there be any waiver of the right otherwise admissible to the assessee in law. The chargeability is not dependent on the admission of or waiver by the assessee. The chargeability is dependent on the charging section, which needs to be strictly construed.[Sail DSP VR Employees Association, 262 ITR 638 (Cal-H.C)]. We note that assessee has himself confessed and accepted that the (interest on VAT, service tax, TDS etc.) expenses are not allowable expenditure under section 37(1) of the Act, being penal in nature, does not mean that these expenses should be disallowed. If these expenses (interest on late deposit of VAT, service tax, TDS etc expense) are allowable under the Act then these can not be disallowed merely because assessee has admitted. Right expenditure ought

to be allowed and right income ought to be taxed. Therefore, the assessing officer, while making the assessment U/s 143(3) took a possible view that these expenses are allowable under section 37(1) of the Act, hence he did not disallow them. Hence, Assessing Officer has adopted one of the courses permissible in law therefore, order made by AO under section 143(3) of the Act, is neither erroneous nor prejudicial to the interest of the Revenue.

12. We note that Coordinate Bench in the case of M/s Naaraayani Sons Pvt. Limited, in ITA No. 1796-1798/Kol/2017, order dated 21.08.2018 held that interest expense on late deposit of VAT, service tax, TDS etc are allowable expenditure under section 37(1) of the Act, the detailed findings, of the Coordinate Bench is given below:

> *"6. We have heard rival submissions and gone through the facts and circumstances of the case. We note that the issue is squarely covered in favour of the assessee by the decision of coordinate bench of this Tribunal in similar case of DCIT Vs. M/s. Narayani Ispat Pvt. Ltd. in ITA No. 2127/Ko1l2014 for AY 2010-11 dated 30.08.2017, wherein the Tribunal has observed as under:*
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> *"7. We have heard the rival contentions of both the parties and perused the material available on record. In the instant case, AO has disallowed the interest expenses incurred by the assessee on account of late deposit of service tax and TDS after having reliance on the judgment of Hon'ble Supreme Court in the case of Bharat Commerce Industries Ltd. Vs. CIT (1998) (Supra). The relevant extract of the judgment reads as under:*
>
> *FACTS*
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> *During the year under consideration, the assessee failed to pay advance tax equivalent to 75 per cent of estimated tax. The Assessing Officer levied interest under section 215 as well as under section 139. The assessee claimed that since taxes which were payable were delayed, the assessee's financial resources increased which were available for business purposes. Hence, the interest which was paid to the Government was interest on capital that would be borrowed by the assessee otherwise. Hence, the amounts should be allowed as*

deduction. The revenue did not allow such deduction. The High Court affirmed the view.

On appeal to the Supreme Court:

HELD When interest is paid for committing a default in respect of a statutory liability to pay advance tax, the amount paid and the expenditure incurred in that connection is in no way connected with preserving or promoting the business of the assessee. This is not expenditure which is incurred and which has to be taken into account before the profits of the business are calculated. The liability in the case of payment of income tax and interest for delayed payment of income-tax or advance tax arises on the computation of the profits and gains of business. The tax which is payable is on the assessee's income after the income is determined. This cannot, therefore, be considered as an expenditure for the purpose of earning any income or profits. Interest which is paid for delayed payment of advance tax on such income cannot be considered as expenditure wholly and exclusively for the purpose of business. Under the Act, the payment of such interest is inextricably connected with the assessee's tax liability. If income-tax itself is not permissible deduction under section 37, any interest payable for default committed by the assessee in discharging his statutory objection under the Act, which is calculated with reference to the tax on income, cannot be allowed as a deduction.

Therefore, it was to be held that deduction of interest levied under sections 139 and 215 would not be allowable under section 37.

In the above judgment, the claim of the assessee for interest expenses was denied as it defaulted to make the payment of advance tax as per the provisions of the Act. The advance tax is nothing but income tax only which the assessee has to pay on his income. In the instant case the default relates to the delay in the payment of advance tax and consequently interest was charged on the delayed payment of advance tax. In the above judgment the Hon' ble Apex Court held that as Income Tax paid by the assessee is not allowable deduction and therefore interest emanating from the delayed payment of income tax (advance tax) is also not allowable deduction.

However the facts of the instant case before us are distinguishable as in the case before us the interest was paid for delayed payment at

service tax & TDS. The interest for the delay in making the payment of service tax &TDS is compensatory in nature. As such the interest on delayed payment is not in the nature of penalty in the instant case on hand.

The issue of delay in the payment of service tax is directly covered by the judgment of Hon' ble Apex Court in the case of Lachmandas Mathura Vs. CIT reported in 254 ITR 799 in favour of assessee. The relevant extract of the judgment is reproduced below:

"The High Court has proceeded on the basis that the interest on arrears of sales tax is penal in nature and has rejected the contention of the assessee that it is compensatory in nature. In taking the said view the High Court has placed reliance on its Full Bench's decision in Saraya Sugar Mills (P.) Ltd. v. CIT [1979] 116 ITR 387 (All.) The learned counsel appearing for the appellant-assessee states that the said judgment of the Full Bench has been reversed by the larger Bench of the High Court in Triveni Engg. Works Ltd. v. CIT [1983] 1441TR 732 (All.) (FB), wherein it has been held that interest on arrears of tax is compensatory in nature and not penal. This question has also been considered by this Court in Civil Appeal No. 830 of 1979 titled Saraya Sugar Mills (P.) Ltd. v. CIT decided on 29-2-1996. In that view of the matter, the appeal is allowed and question Nos. 1 and 2 are answered in favour of the assessee and against the revenue. "

In view of the above judgment, there remains no doubt that the interest expense on the delayed payment of service tax is allowable deduction. The above principles can be applied to the interest expenses levied on account of delayed payment of TDS as it relates to the expenses claimed by the assessee which are subject to the TDS provisions. The assessee claims the specified expenses of certain amount in its profit & loss account and thereafter the assessee from the payment to the party deducts certain percentage as specified under the Act as TDS and pays to the Government Exchequer. The amount of TDS represents the amount of income tax of the party on whose behalf the payment was deducted & paid to the Government Exchequer. Thus the TDS amount does not represent the tax of the assessee but it is the tax of the party which has been paid by the assessee. Thus any delay in the payment of TDS by the assessee cannot be linked to the income tax of the assessee and consequently the principles laid down by the Hon'ble Apex Court in the case of

Bharat Commerce Industries Ltd. Vs. C1T (1998) reported in 230 1TR 733 cannot be applied to the case on hand.

Thus, in our considered view, the principle laid down by the Hon'ble Supreme Court in the case of Bharat Commerce Industries Ltd. (supra) is not applicable in the instant facts of the case. Thus, we hold that the Assessing Officer in the instant case has wrongly applied the principle laid down by the Hon 'ble Supreme Court in the case of Bharat Commerce Industries Ltd. (supra). We also find that the Hon'ble Supreme Court in the case of Lachmandas Mathura (Supra) has allowed the deduction on account of interest on late deposit of sales tax u/s 37(1) of the Act. In view of the above, we conclude that the interest expenses claimed by the assessee on account of delayed deposit of service tax as well as TDS liability are allowable expenses u/s 37(1) of the Act. In this view of the matter, we find no reason to interfere in the order of Ld. C1T(A) and we uphold the same. Hence, this ground of Revenue is dismissed. " Respectfully following the aforesaid decision, we confirm the order of Ld. CIT(A) and dismiss the ground no. 5 of revenue's appeal for AY 2012-13 and thus the appeal of Revenue for AY 2012-13 also stands dismissed."

13. Therefore, it is abundantly clear that interest on late deposit of VAT, service tax, TDS etc are allowable expenditure under section 37(1) of the Act and the assessing officer has taken a possible view therefore order passed by the assessing officer U/s 143(3) dated 11.05.2016, is neither erroneous nor prejudicial to the interest of Revenue and cannot be held to be unsustainable in law. Therefore, we quash the order passed by the ld Pr.CIT U/s 263 of the Act.

14. In the result, the appeal of Assessee is allowed.

Order Pronounced in the Open Court on 28-06-2019

Sd/-	Sd/-
(A.T. Varkey)	(Dr. A.L.Saini)
Judicial Member	Accountant Member

Dated: 28 -06-2019

*PRADIP (Sr.PS)

Copy of the order forwarded to:

1. The Appellant/Assessee: M/s. Emdee Digitronics Pvt. Ltd. C/o Subhash Agarwal & Associates, Advocates, Siddha Gibson, 1 Gibson Lane, Suite 213, 2nd Fl., Kolkata-69.

2 The Respondent/Department: The Pr. Commissioner of Income-tax-4, Kolkata, Aaykar Bhawan,P-7 Chowringhee Square, Kolkata-69.

3. The CIT-, 4. The CIT(A)-,

5. DR, Kolkata Benches, Kolkata

True Copy, By order,

Asst. Registrar
ITAT, Kolkata Benches