

**A Study**  
**Whether interest paid**  
**u/s 201(1A) of the Income Tax Act, 1961**  
**on late payment of TDS**  
**is an allowable expenses**  
**&**  
**accordingly entitled to be deducted**  
**while computing total income u/s 2(45) r.w. section 14 of the Act**  
*{Please read conclusion in the last with special reference to interest paid or to be paid during the lockdown period of Covid-19}*

1. In every business or profession, often expenditure is incurred towards “interest” on delayed payment of TDS. Whether this expense is allowable as business expenditure u/s 36(1)(iii) of the Income Tax Act, 1961 {hereinafter referred to as the Act} or u/s 37(1) of the Act or to be disallowed u/s 40(a)(ii) of the Act or to be allowed or disallowed under any other provision of the Act.
2. Interest on delayed payment of TDS is payable **u/s 201(1A)** of the Act. Such interest is the **simple interest** payable for following two reasons:
  - (i) if whole or any part of the tax, which is deductible under the provisions of the Act, but **not deducted**;
  - (ii) if after deduction of tax it is **not paid** as required by or under the Act.
3. In case such interest is required to be paid, it is payable before furnishing the statement u/s 200(3) of the Act.
4. The interest u/s 201(1A) is payable as follows:

SN	Rate of interest	How to calculate interest	Amount in respect of which interest is payable	Period for which interest is payable
1.	1%	for every month or part of a month	On the amount of tax not deducted	From the date on which tax was deductible to the date on which such tax is deducted
2.	1.5%	for every month or part of a month	On the amount of tax deducted but not paid within time	From the date on which tax was deducted to the date on which such tax is actually paid

5. Word “**interest**” is defined **section 2(28A)** of the Act, as follows:

*“interest” means interest payable in any manner in respect of any moneys borrowed or debt incurred (including a deposit, claim or other similar right or obligation) and includes any service fee or other charge in respect of the moneys borrowed or debt incurred or in respect of any credit facility which has not been utilised;*

**Profits or gains of business or profession**

6. **Section 28** of the Act provides incomes which shall be chargeable to income-tax under the head “Profits and gains of business or profession”.
7. **Clause (i) of section 28** provides “the profits and gains of any business or profession which was carried on by the assessee at any time during the previous year” as one of such income.
8. Section 28 being the charging section under **Chapter IV-D** of the Act, such income needs to be first computed in terms of the provisions of section 2(45) r/w section 14 of the Act before the same is charged to income-tax u/s 4(1) of the Act.
9. **Section 29** provides that “the income referred to in section 28 shall be computed in accordance with the provisions contained in section 30 to 43D”.
10. It means that before any business or professional income is included in “total income” in terms of section 14 r/w section 28 of the Act, it is to be computed in accordance with the provisions of section 30 to 43D, which provides the **manner** in which income chargeable under the head “Profits and gains of business or profession” is to be computed, as envisaged in section 2(45) of the Act.
11. In the context of “**interest**” following sections are relevant:
- (i) Section 36 : Other deductions
  - (ii) Section 37 : General
  - (iii) Section 40 : Amounts not deductible
  - (iv) Section 40A : Expenses or payments not deductible in certain circumstances
  - (v) Section 43B : Certain deductions to be allowed on actual payment
12. **Section 30 to 38** provides deductions in respect of **specific expenses and allowances** incurred for the purpose of business, the income of which is chargeable u/s 28 of the Act, e.g.
- (i) u/s 30 : for rent, rates, taxes, repairs and insurance for buildings;
  - (ii) u/s 31 : for repairs and insurance of machinery, plant and furniture;
  - (iii) u/s 32 : depreciation
  - (iv) u/s 36 : other deductions
    - (a) u/s 36(1)(i) : insurance premium of stocks and stores;
    - (b) u/s 36(1)(ib) : health insurance premium of employees;
    - (c) u/s 36(1)(iii) : interest on borrowed capital;
    - (d) u/s 36(1)(vii) : bad debts;

- (e) u/s 36(1)(xiii) : banking cash transaction tax;
  - (f) u/s 36(1)(xv) : securities transaction tax;
  - (g) u/s 36(1)(xvi) : commodities transaction tax *etc.*
  - (v) u/s 37 : general
  - (vi) u/s 38 : Building etc., partly used for business, etc. or not exclusively so used.
13. Section 40, section 40A and section 43B are the **sections of disallowances**. These sections either deny or restrict the allowance of deductions allowable under section 30 to 38 **or** imposes condition for such allowance.
14. **Section 40** provides disallowance in respect of certain expenses. It starts with *non obstante clause* and provides that “**notwithstanding anything to the contrary in section 30 to 38**, the following amounts shall **not** be deducted in computing the income chargeable under the head “profits and gains of business or profession”
15. It means that if any expense is allowable u/s 30 to 38, it may be disallowed u/s 40 of the Act, as provided therein.
16. **Section 40A** provides disallowances in **certain circumstances**. Sub-section (1) provides that the provisions of *this section* shall have the effect **notwithstanding anything to the contrary contained in any other provision of this Act** relating to the computation of income under the head “Profits and gains of business or profession”.
17. It means that if any expense is otherwise allowable under the provisions of this Act, it may be disallowed u/s 40A of the Act, as provided therein.
18. **Section 43B** provides deductions of certain expenses only on **actual payment**. It starts with *non obstante clause* and provides that “**notwithstanding anything contained in any other provision of this Act**, a deduction otherwise allowable under this Act in respect of-
19. It means that if any expense is otherwise allowable under the provisions of this Act, it may be disallowed u/s 43B of the Act, as provided therein.

### Interest paid u/s 201(1A), whether allowable as deduction u/s 36(1)(iii)?

20. **Section 36(iii)** provides that following deduction shall be allowed in respect of computing the income referred to in section 28:

“the amount of the **interest** in respect of **capital borrowed** for the purposes of the business or profession.”

“**Provided** that any amount of the interest paid, in respect of capital borrowed for acquisition of an asset (whether capitalised in the books of account or not); for any period beginning from the date on which the capital was borrowed for acquisition of the asset till the date on which such asset was first put to use, shall not be allowed as deduction.”

21. We need to examine, whether simple interest paid u/s 201(1A) of the Act for non deduction of tax at source under the provisions of the Act **or** after deduction is not paid within the time allowed in or under the Act, *is interest on capital borrowed for the purpose of business or profession?*
22. The answer lies in the ratio of law decided by the Apex Court in the case of In the case of **Bharat Commerce and Industries [1998] 230 ITR 733 (SC)** as follows:

**Questions referred in C.A. No. 5509 of 1985**

*"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?"*

**Order**

The Apex Court rejected the contention of the assessee that the taxes which were payable were delayed **and** to that extent the assessee's financial resources increased. These increased resources became available for business purposes. Hence the interest which is paid to the Government under **Section 139 and 215** represent, in effect, **interest on capital that would have been borrowed** by the assessee otherwise. Hence, these amounts should be allowed as deduction under **Section 37** as expenses incurred wholly and exclusively for the purpose of its business.

**Questions referred in C.A. Nos. 3355-56 of 1993**

*"Whether on facts and circumstances of the case and in law the Tribunal was right in holding that the assessee was not entitled to the deduction of Rs. 2,94,082 in assessment year 1977-78 **and** Rs. 43,142/- assessment year 1978-79 being the interest payable on account of **additional liability for income-tax and surtax** on account of the disclosure of income made under the Voluntary Disclosure of Income and Wealth Act, 1976 **u/s 37 or 36(1)(iii)** of the Income-tax Act, 1961?."*

**Order**

Apart from section 37, the assessee has also pressed 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.

23. Following the above ratios of law in the case of Bharat Commerce and Industries (1998) 230 ITR 733 (SC) the **Madras High Court** in the case of **Chennai Properties and Investment Ltd., 239 ITR 435 (Mad)** held as follow:

### **Facts of the case**

The assessee had, in the course of assessment proceedings for the assessment year 1981-82, claimed deduction of Rs. 10,542 which amount had been paid by it to the Income-tax Department as interest **under Section 201(1A)** of the Income-tax Act, 1961. The claim so made was rejected by the Income-tax Officer and that rejection affirmed in appeal by the Commissioner of Income-tax. The Income-tax Appellate Tribunal, however, on a further appeal by the assessee, held that the interest so paid **was incidental to the business of the assessee and allowed the amount as deduction under Section 37** of the Income-tax Act,

### **Issue**

*“Interest under Section 201(1A) paid by the assessee was an **expenditure incidental to the business** and allowed as a deduction from the profits and gains of the business for the assessment year 1981-82.”*

### **Held**

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 business expenditure.

24. In view of above judgments, the amount of income tax due to be paid to the Government but not paid **or** the amount of tax deducted at source but not retained and not paid in time cannot be equated with and treated as capital borrowed from the Government in terms of section 36(1)(iii) of the Act. Hence interest paid on such amount cannot be allowed as deduction u/s 36(1)(iii) of the Act.
25. Therefore, in view of the decision of the Apex Court in the case of **Bharat Commerce and Industries [1998] 230 ITR 733 (SC)**, such interest is not allowable as deduction u/s 36(1)(iii) of the Act. The judgment of the Apex Court to this extent is law of the land by virtue of Article 141 of the Constitution of India.

### **Interest paid u/s 201(1A), whether allowable as deduction u/s 37(1)?**

26. We need to examine, whether simple interest paid u/s 201(1A) of the Act for non deduction of tax at source under the provisions of the Act **or** after deduction is not paid within the time allowed in or under the Act, **is allowable under section 37(1) of the Act being incurred for the purpose of business or profession?**

27. **Section 37(1)** provides for deduction of any expenditure laid out **or** expended wholly **and** exclusively for the purpose of **“the”** business or profession.
28. Section 37(1) envisages following conditions for allowance of deduction:
  - (i) the amount being claimed should be an expenditure;
  - (ii) it should be laid of expended wholly and exclusively for the purpose of **the** business or profession.
29. Use of word **“the”** before the expression **“business or profession”** signifies the **“business or profession”**, income of which is being computed u/s 29 and which is chargeable to income-tax u/s 28 of the Act.
30. Section 37(1) r.w. its *Explanation 1* makes certain exclusions. The relevant exclusions made by the section along with the *Explanation 1* are the following:
  - (i) expenditure in the nature of **capital nature**,
  - (ii) expenditure in the nature of **personal expenses** of the assessee,
  - (iii) expenditure incurred for any purpose which is an **offence**,
  - (iv) expenditure incurred for any purpose which is **prohibited** by law,
  - (v) expenditure, **not** being expenditure of the nature described in section 30 to 36
31. Interest on delayed payment of TDS squarely falls within the ambit of section 37(1) **and** the question of its deductibility **or** allowability depends on the fact whether such interest can be regarded as expenditure laid out or expended wholly and exclusively for the purpose of the business or profession **or** hit by the exclusions provided.
32. The exclusions (i) **and** (ii) above are **not** applicable to the question in hand. Such interest is neither expenditure in the nature of capital nature nor expenditure in the nature of personal expenses of the assessee.
33. Further, the exclusion (iii) **and** (iv) are applicable **only** if the purpose of the expenditure is an offence **or** is prohibited by law.
34. Such interest is not paid for the purpose which is an offence or prohibited by law. In fact such interest is paid for the purpose of the compliance with the provisions of the Income Tax Act, which is related to an activity occurring in the course of carrying on business or profession, as the case may be.
35. Such interest is paid due to delay in payment of TDS, which an assessee is obliged to deduct. He is required to make the payment of such TDS within the stipulated time, so that he may furnish statement of TDS, consequent to which credit of such TDS may be allowed to the deductee . The deductor is allowed delayed payment of TDS but subject to payment of interest. It is not the law that delayed payment is prohibited by law. The delayed payment is allowed subject to payment of simple interest u/s 201(1A).
36. Therefore, the exclusions (iii) **and** (iv) are also not applicable to such interest, as it is not incurred for any offence or prohibition of law.

37. The exclusions (v) is also **not** applicable to the question in hand. Such interest is **not** covered under section 36(1)(iii) of the Act, as it is **not** paid in respect of capital borrowed.
38. It may be concluded by saying that as per the provisions of section 29, the incomes referred to in section 28 shall be computed in accordance with the provisions of sections 30 to 43D. Section 37(1) provides that *“any expenditure laid out or expended wholly and exclusively for the purpose of the business or profession shall be allowed in computing the income chargeable under the head “Profits and Gains of business or profession”.* Any expenditure incurred in relation to any business activity shall be treated as laid out or expended for the purposes of the business or profession, as the case may be. Making payments of the nature to which the provisions of Chapter XVII-B of the Act applies, deducting tax in accordance with the provisions of the said chapter and payment of TDS are the activities which relates to the business or profession, as the case may be. As the interest takes its colour from the principal amount with regards to which it is paid, therefore, interest on late payment of TDS also relates to the activity of deduction of TDS and payment thereof, thus a business activity and business expenditure.
39. Such interest also does not fall in the trap of section 40(b)(ii).

**Interest paid u/s 201(1A), whether disallowable as deduction u/s 40(a)(ii)?**

40. **Section 40** is the section of disallowance. It imposes variable conditions on allowability of deduction of expenses and allowances otherwise **allowable under section 30 to 38** in computing **“the”** income chargeable under the head **“Profits and gains of business or profession”**.
41. **Section 40(a)(ii)** specifically disallows rate or tax paid as a deductible expenditure.
42. However, **interest** paid u/s 201(1A) for delayed payment of TDS does not falls within the ambit of this section.
43. **Section 40(a)(ii)** is reproduced hereunder for ready reference:  
*“any sum paid on account of any **rate or tax** levied on **“the”** profits or gains of any business or profession or assessed at a proportion of, **or** otherwise on the basis of, any **such** profits or gains”*
44. For the better understanding of the provision, it is being dissected as follows:
- any sum paid
  - on account of
  - any
  - rate
  - or
  - **“tax”**
  - levied

- on
- **the “profits or gains of any business or profession”**
- or assessed at a proportion of, or otherwise on the basis of, any “such profits or gains”

**Tax & Tax on the Profits or gains of any business or profession**

45. Under the Act the definition of “**tax**” u/s 2(43) of the Act **does not** include penalty **or** interest **and** that the concepts of tax, penalty and interest are different concepts under the Act.
46. This interpretation in reply to question No. 5 finds favour from the decision of Apex Court in the case of **Harshad Shantilal Mehta vs. Custodian 231 ITR 871, 890 (SC)**, as follows:
- “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 156, 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.”*
47. The expression **“profits or gains of any business or profession”** which is employed in section 40(a)(ii) can, in the context, have reference only to **“the”** profits or gains as referred to in section 28 and to be computed under 29 of the Act **and cannot** cover the net profits or gains arrived at or determined in a manner **other than** that provided by the said sections.
48. It is the business of the assessee who makes payments of income and claim the same as expense in his computation of total income. Such payment of expense is subjected to TDS under the provisions of the Act. *Such TDS cannot be equated with the tax on profits or gains of business of the deductor which is computed u/s 29 of the Act and which is chargeable u/s 28 of the Act.*
49. The expression **the profits or gains of any business or profession** used in section 40(a)(ii) **and** the expression **“allowable under section 30 to 38 in computing the income chargeable under the head “Profits and gains of business”** used in the long lines of section 40 very clearly states that the “tax” to be disallowed u/s 40(a)(ii) is the “tax” on profits and gains of business, which is chargeable u/s 28 and which is to be computed u/s 29 with the aid of sections 30 to 43D. Therefore, the tax here can not be equated with TDS.
50. The above proposition finds support from the decision of Apex Court in the case of **Jaipuria Samla Amalgamated Collieries Ltd. vs. CIT 82 ITR 580 (SC)**
- “it can be said that tax deduction at source is not the income-tax which is required to be paid on income chargeable to tax u/s 28, but is the tax to be deducted on payment being made to other party.”*

51. In the case of **Arthur Anderson & Co. vs. ACIT (2010) 190 Taxman 279 (Bombay)** in its return of income, assessee disclosed certain interest income as income from other sources. In notes to computation of income, it was disclosed that said interest income represented difference between **interest received u/s. 244A and interest paid u/s. 220**. During the course of assessment, AO had raised a query regarding said income and after considering assessee's reply, passed an assessment order. Later AO had issued a notice u/s. 148 on the ground that entire interest u/s. 244A was required to be offered for taxation. On writ, it was held that, since assessee has disclosed fully and truly all material facts, reopening of assessment could not be sustained. Further, referring to SC decision in the case of **Harshad Shantilal Mehta vs. Custodian 231 ITR 871 (SC)**, it was held that interest paid u/s. 220(2) **could not** be considered as **tax** for the purpose of business disallowances in view of the following observations:

*"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 (1998) 231 ITR 871. 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 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."*

52. In nut shell, the point of discussion is that what kind of **tax** is required to be disallowed;
- tax which is required to be paid on own income of the assessee
  - or**
  - the tax which is required to be deducted by the assessee, which is nothing but the obligation of the assessee to deduct tax on payment being made to other assessee.
53. Interest on late payment of TDS is in compensatory nature.

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54. Therefore, the tax deducted at source can never be considered “tax” u/s 40(a)(ii) and once if TDS cannot be considered, certainly interest on late payment of TDS cannot be considered for disallowance u/s 40(a)(ii) of the Act.

## Judicial Examination

55. Therefore, in view of the above analysis of the law, **interest on late payment of TDS** is allowable as expenditure u/s 37(1) of the Act because –
- (i) it is an expenditure;
  - (ii) it is **not** in the nature of **capital expenditure**;
  - (iii) it is **not** in the nature of **personal expenditure**;
  - (iv) it is **not** an expense in relation to borrowed capital, therefore, outside the ambit of section 36(1)(iii). Hence, eligible u/s 37(1);
  - (v) it is **not** an expense in relation to rate or tax on **the** profits and gains of business or profession chargeable u/s 28. Therefore, it is not related to personal income tax of the assessee (deductor), which is otherwise not allowable u/s 40(a)(ii);
  - (vi) it is **not** incurred for any offence or any legal prohibition. Making delayed payment of TDS is not prohibited, rather it is allowed coupled with payment of interest for the delay;
  - (vii) it is **not penalty**, as under the Act, tax, interest, penalty, fee, fine are used and treated differently. One example is section 156, wherein tax, interest, penalty, fine or any other sum are used mutually exclusively.  
*{DCIT vs. M/s. Narayani Ispat Pvt. Ltd., ITAT Kalkata}*
  - (viii) it is **not penal** in nature;  
*{Lachmandas Mathuradas vs. CIT 254 ITR 799 (SC)}*  
*{DCIT vs. M/s. Narayani Ispat Pvt. Ltd., ITAT Kalkata}*
  - (ix) it is, rather, **compensatory in nature**;  
*{Lachmandas Mathuradas vs. CIT 254 ITR 799 (SC)}*  
*{Mahalakshmi Sugar Mills Co. vs. CIT (1980) 123 ITR 429 (SC)}*  
*{Prakash Cotton Mills (P) Ltd. vs. CIT (1993) 201 ITR 684 (SC)}*  
*{Malwa Vanaspati & Chemical Co. vs. CIT (1997) 225 ITR 383 (SC)}*  
*{CIT vs. Ahmedabad Cotton Manufacturing Co. Ltd. (1994) 205 ITR 163 (SC)}*  
*{DCIT vs. M/s. Narayani Ispat Pvt. Ltd., ITAT Kalkata}*

- (x) it is incurred for the purpose of the business or profession, as the case may be, because it relates to business or professional activities:
- (a) incurring of expenses like salary, wages, interest, commission, brokerage, fee for professional services, fee for technical services, royalty, rent, carrying out any work in pursuance of a contract etc. are **for the purpose of business or profession**;
  - (b) deduction of tax at source there from under chapter XVII-B is inextricably an activity **for the purpose of business of profession**;
  - (c) payment of TDS is again inextricably an activity **for the purpose of business of profession**;
  - (d) default in deduction of tax is inextricably business or professional activity, therefore, interest payable for such default is **for the purpose of business of profession**;
  - (e) default in payment TDS or delay in payment of TDS after deduction is also inextricably business or professional activity, therefore, interest payable for such default is **for the purpose of business of profession**;
- (xi) it is **not** an expense of the assessee (deductor). Rather, it is an obligation, which he is required to discharge;
- (xii) it is incurred in relation to **tax of the other person** (deductee), which has direct nexus with the expense incurred and claimed by the assessee (deductor), e.g. salary, wages, interest, commission, brokerage, fee for professional services, fee for technical services, royalty, rent, carrying out any work in pursuance of a contract etc. **Therefore, it will partake its colour and character from such expense**;
- (xiii) it is akin to interest on sales tax, central sales tax, value added tax, service tax, excise duty, commercial cess etc.;
- (xiv) it is **not** specifically disallowable under any provision of the Act.
56. In support of the above propositions reliance may be placed on the following judicial pronouncements, wherein **interest paid u/s 201(1A) on delayed payment of TDS** has been **allowed as business expenditure u/s 37(1)** of the Act:

SN	Appellate Jurisdiction	Citation
1	ITAT, Kolkata	DCIT, Circle 3(1), Kolkata vs. Narayani Ispat (P) Ltd. {ITA NO. 2127/Kol/2014} AY 2010-11, Dated 30.8.2017

2	ITAT, Kolkata	Saj Food Products vs. DCIT, Circle 12, Kolkata {ITA No. 1887/Kol/2017} AY 2011-12 Dated 6.4.2018
3	ITAT, Kolkata	DCIT, Circle CC 3(1), Kolkata vs. Rungta Mines Ltd. {ITA No. 1531/Kol/2017} AY 2014-15, Dated 5.10.2018
4	ITAT, Mumbai	STUP Consultants (P) Ltd. vs. ACIT {ITA No. 5827/Mum/2012 AY 2009-10, Dated 11.12.2018
5	ITAT, Bangalore	M/s IDS Next Business Solutions Pvt Ltd , Bangalore vs. The ACIT Circle-3(1)(1), Bangalore {ITA 510/BANG/2018} AY 2014-15, Dated 15.6.2018
6	ITAT, Kolkata	DCIT vs. Maa Annapurpa Transport Agency (P) Ltd. {ITA No. 822/Kol/2018} AY 2013-14, Dated 2.1.2020

57. The above judgments are being discussed hereunder one by one.

**DCIT, Circle 3(1), Kolkata vs. Narayani Ispat (P) Ltd.  
{ITA NO. 2127/Kol/2014, AY 2010-11}  
ITAT Kolkata  
Dated 30.8.2017**

**Facts**

<b><u>Account head</u></b>	<b><u>Amount (Rs)</u></b>	<b><u>Remarks</u></b>
Interest paid on service tax	15,880	The expenses include interest paid for late payment of service tax dues
Interest paid on TDS	70,777	The expenses include interest paid for late payment of TDS

**Held**

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. CIT* (1998) reported in 230 ITR 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. CIT(A) and we uphold the same. Hence, this ground of Revenue is dismissed.

**Saj Food Products vs. DCIT, Circle 12, Kolkata**  
**{ITA No. 1887/Kol/2017, AY 2011-12}**  
**ITAT Kolkata**  
**Dated 6.4.2018**

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. CIT (1998)* reported in 230 ITR 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. CIT(A) and we uphold the same. Hence, this ground of Revenue is dismissed.

13. In view of above, we are of the view that the CIT-A was not correct in confirming the impugned disallowance of Rs.1230/- made by the AO on account of interest on late deposit of TDS. The order of the CIT-A on this issue is set aside and the AO is directed to allow the same. Ground no. 2 raised by the assessee is allowed.

**DCIT, Circle CC 3(1), Kolkata vs. Rungta Mines Ltd.**  
**{ITA No. 1531/Kol/2017, AY 2014-15}**  
**ITAT Kolkata**  
**Dated 5.10.2018**

Ld.AR submits that the issue in hand is covered in favour of assessee on identical facts and issue by the **order dt. 06-04-2018** of this **Coordinate Bench, ITAT, Bench-D in assessee's own case, ITA No. 1887/Kol/2016 for the A.Y 2011-12**, copy of the same is on record and referred to paras 12 & 13 of the said order.

9. After hearing both the parties and on perusal of record including the order dt. 06-04-2018 as relied on by the Id. AR of assessee. We find that the facts and circumstances of the case as relied on by the Id.AR are similar and identical with the facts and circumstances of the case in hand. We also find that the Co-ordinate Bench, ITAT, 'D' Bench, Kolkata in the case of supra has discussed the issue thoroughly analyzing with facts of the case laws of the Hon'ble Supreme Court in the case of **Bharat Commerce Industries Ltd reported in (1998) 230 ITR 733(SC) & Lachmandas Mathura reported in 254 ITR 799(SC)**, wherein it was held interest paid on late deposit of sales tax is an allowable deduction u/s. 37(1) of the Act. **Relevant portion of tribunal order is reproduced herein below:-**

*"12. Heard both the parties and perused the record including the order dt. 30-08-2017 as relied on by the assessee before us. We find that the issue in hand is covered in favour of assessee by the said order dt. 30-08-2017 of this Tribunal in the case of (supra), which held that interest paid on delayed deposit of TDS is an allowable deduction by placing reliance on the decisions of Hon'ble Supreme Court in the case of Bhara Commerce Industries Ltd Vs. CIT reported in (1998) 230 ITR 733 (SC). The Co-ordinate Bench also referred to the decision of Hon'ble Supreme Court in the case of Lachmandas Mathura vs. CIT reported in 254 ITR 799 (SC), which held interest paid on late deposit of sales tax is an allowable deduction u/s 37(1) of the Act. Relevant portion of order dt.30- 08-2017 is reproduced herein below for better understanding:-*

*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 (1998) reported in 230 ITR 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. CIT(A) and we uphold the same. Hence, this ground of Revenue is dismissed.*

*13. In view of above, we are of the view that the CIT-A was not correct in confirming the impugned disallowance of Rs.1230/- made by the AO on account of interest on late deposit of TDS. The order of the CIT-A on this issue is set aside and the AO is directed to allow the same. Ground no. 2 raised by the assessee is allowed. "*

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10. In view of above, we find no infirmity in the impugned order of the CIT-A and it is justified. Thus, ground no. 2 raised by the revenue is dismissed.

**STUP Consultants (P) Ltd. vs. ACIT**  
**{ITA No. 5827/Mum/2012, AY 2009-20}**  
**ITAT, Mumbai**  
**Dated 11.12.2018**

However, the amount of *tax deduction at source [TDS]* represents the amount of income tax of the third parties party on whose behalf the payment was deducted by the assessee & paid to the Government Exchequer. Therefore, TDS amount do not represent the tax of the assessee but it is the tax of the party which has been paid by the assessee. This being the case, any interest paid on account of late payment of TDS could not be linked to the Income Tax of the assessee and therefore, the deduction thereof was available to the assessee. Hence, the deduction of Rs.9,128/- as claimed by the assessee would be an allowable expenditure.

**M/s IDS Next Business Solutions Pvt Ltd , Bangalore vs. The Assistant**  
**Commissioner of Income Tax Circle-3(1)(1), Bangalore**  
**{ITA 510/BANG/2018, AY 2014-15}**  
**ITAT, Bangalore**  
**Dated 15.6.2018**

**Issue**

The learned CIT (A) erred in confirming the disallowance of interest payment of Rs.10,45,601 on belated TDS payment without properly appreciating the law and the facts in proper perspective.

The ld. AR of assessee placed reliance on the Tribunal order rendered in the case of **DCIT Vs. Narayani Ispat Pvt. Ltd. in ITA No. 2127/Kol/2014 dated 30.08.2017**. He submitted a copy of this Tribunal order and it was submitted that in this case also, the issue involved was regarding disallowance of interest of Rs. 15,880/- on service tax and Rs. 70,000/- on TDS because of the fact that the assessee failed to deposit tax of other parties to Central Government within due time and it was held by the Tribunal in that case that the interest expenses claimed by the assessee on account of late deposit of service tax as well as TDS are allowable u/s. 37(1) of IT Act and in coming to the conclusion, the Tribunal has followed the judgment of Hon'ble Apex Court rendered in the case of Lachmandas Mathura Vs. CIT as reported in 254 ITR 799 and another judgment of Hon'ble Apex Court rendered in the case of Bharat Commerce Industries Ltd. Vs. CIT as reported in 230 ITR 733. The ld. DR of revenue supported the orders of authorities below.

**Held**

We find that in that case also, the issue involved was regarding allowability of interest on belated payment of service tax and TDS whereas in the present case, the issue in dispute is regarding interest payment on belated payment of TDS. Hence it is seen that the facts and dispute are similar and therefore, by respectfully following this Tribunal order, we decide the issue in favour of the assessee.

**DCIT vs. Maa Annapurpa Transport Agency (P) Ltd.**  
**{ITA No. 822/Kol/2018} AY 2013-14**  
**ITAT Kolkata**  
**Dated 2.1.2020**

**Issue**

That on the facts and the circumstances of the case and in law, the Ld. CIT(A) has erred in allowing the amount of Rs. 3,15,107/- being the interest on late payment of TDS.

**Held**

Ground no. 4 is against the action of the ld. CIT(A) in allowing the amount of Rs. 3,15,107/- which was disallowed by AO being the interest on late payment of TDS. We note that the AO disallowed Rs.3,15,107/- since this amount has been remitted by the assessee for late payment of TDS. We note that the ld. CIT(A) has given relief taking note of the decision of this Tribunal in the case of **M/s. Narayani Ispat Pvt. Ltd ITA No. 2127/Kol/2014** as well as the decision of the Hon'ble Allahabad High Court in the case of **Triveni Engineering Works Ltd. vs Commissioner Of Income-Tax ( 144 ITR 732)**. We note that this issue is no longer res integra. This Tribunal in **Narayani Ispat P. Ltd.** has decided this issue by holding as under:

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 say 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) 144 ITR 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 mis Court in Civil Appeal No. 830 of 1979 titled **Sarraya 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

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principles laid down by the Hon'ble Apex Court in case of Bharat Commerce Industries Ltd. vs. CIT (199) reported in 230 ITR 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 Id. CIT(A) and we uphold the same. Hence, this ground of Revenue is dismissed.”

Therefore, respectfully following the said decision of the Tribunal we confirm the impugned order of the Id. CIT(A) on this issue and dismiss the appeal of the revenue.

### Adverse view

58. However, recently, *Hon'ble ITAT, Delhi* has taken different and adverse view on this issue in the case of *DCIT, New Delhi vs. DLF Ltd., New Delhi in {ITA No. 2749/Del/2013, Dated 27.5.2019, which is as follows:*

32. The next issue relates to addition on account of **interest on late deposit of TDS.**

33. The facts in brief are that the Id. Assessing Officer on the basis of comments made by the Special Auditor observed that **interest of Rs. 28,79,372/- paid on late deposit of TDS has been claimed against interest received on income tax refund** and the interest payment on late deposit of TDS is not allowable expenditure. In response to the show cause notice, the assessee relied upon the judgment of Hon'ble Karnataka High Court in the case of **CIT vs. Oriental Insurance Company Ltd., (2009) 183 Taxman 186 (Kar.)**. However, the Id. Assessing Officer held that the assessee has not furnished any statement regarding late deposit of TDS.

34. Id. CIT(A) has confirmed the said addition after observing and holding as under:

33.10 I have considered the observations of Special Auditors as well as of the Assessing Officer and submission of the appellant. It is seen that the appellant company has **received interest on income tax refund of Rs 30,31,199/-**. This interest was credited in the account “interest paid others - Income Tax” and this interest on refund was adjusted against the **interest paid on late payment of TDS of Rs. 28,79,372/-**. Thus, an amount of Rs. 28,79,372/- was adjusted against the interest received on income-tax refund and balance amount was offered as interest income. The interest paid on late payment of TDS is **not** an allowable expenditure **u/s 37** of the IT Act. This is not an expenditure wholly and exclusively for the purposes of the business of the appellant company, therefore same is not an allowable expenditure. Hence, the disallowance of set off of interest payment on late deposit of TDS against the interest received on income tax refund was justified and same is confirmed.”

35. Before us the learned counsel submitted that in an identical issue, **ITAT Kolkata Bench in the case of DCIT vs. M/s. Narayani Ispat Pvt. Ltd., ITA No. 2127/Kol/2014, order dated 30.08.2017** wherein it was held that amount is in the nature of tax of the deductee, *i.e.*, other party and not that of the assessee and as such the interest on late deposit of TDS is allowable expenses u/s. 37 of the Act. In support, following observations and findings of the Tribunal in para 7 was referred: “...in the case before us the interest was paid for delayed payment of 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] 144 ITR 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. CIT (1998) reported in 230 ITR 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 the Id. CIT(A) and we uphold the same. Hence, this ground of Revenue is dismissed.”

36. Before us, the Id. Special Counsel for the revenue submitted that there is one direct judgment of Hon'ble Madras High Court in the case of ***Chennai Properties and Investment Ltd., 239 ITR 435 (Mad)*** and submitted that now in view of this only judgment of Hon'ble High Court, in this issue, the matter should be decided against the assessee.

37. After considering the rival submissions, we find that the assessee-company has received an **interest on income tax refund of Rs. 30,31,199/-** and such an interest was credited in the account of “interest paid others – Income Tax” and **such an interest of refund was adjusted against the interest paid on late payment of TDS of Rs.28,79,372/-** and only the balance amount has been offered as interest income. Thus, in this manner, interest paid on late payment of TDS has been claimed as expenditure u/s. 37 of the Act.

38. Learned counsel for the assessee had contended that the TDS amount is in the nature of tax for the deductee and not that of the assessee and such interest on late deposit of TDS is allowable expenses u/s. 37 because it has been incurred during the course of business. Under the provision of the Act, levy of interest for delay in remittance of the TDS has been envisaged u/s. 201(1A) which is not in the nature of penalty albeit it is more on account of delayed tax, deposited by the assessee on behalf of the deductee, *i.e.*, other party for which the interest is charged. The amount of TDS represents the amount of income tax which is payable by the party on whose behalf the deductor has deducted the tax and pays to the Government Exchequer. The TDS amount does not represent tax liability of the assessee albeit it is the tax of the other party, but it has to be paid by the assessee. In case there is any delay in payment of tax deducted by the assessee on behalf of the deductee, then it cannot be linked or reckoned as income tax of the assessee payable by the assessee, and moreover the interest herein is more of compensatory in nature. Though, Co-ordinate Bench of ITAT Kolkata in the case of ***DCIT vs. M/s. Narayani Ispat Pvt. Ltd. (supra)*** has allowed the said expenditure.

***Even though, we may be persuaded by such a reasoning***, however, we find that ***Hon'ble Madras High Court*** as pointed out by the Id. Special Counsel for the revenue, in the context of interest u/s. 201(1A) only, has held that the TDS partakes the character of income tax and is not allowable as business expenditure. The relevant observation of the ***Hon'ble Court*** reads as under:

“The liability for deduction of tax arises by reason of the provisions of the Act. Under s. 201, the consequence of failure to comply with the same renders that person liable to be deemed as an assessee in default with all the consequences attached thereto. The liability to pay interest on the amount not deducted or deducted but not paid is directly related to the failure to deduct or remit the amount. The amount required to be deducted is the amount payable as income-tax. ***The interest paid for the period of delay takes colour from the nature of the principal amount required to be paid, but not paid within time.*** The ***principal amount*** here would be the income-tax and the interest payable for

delayed payment is the consequence of failure to pay the tax and in the circumstances, in the **nature of a penalty though not described as such in sub-s. (1A) of s. 201 of the Act.** The fact that the income-tax required to be remitted was not income-tax payable by the assessee, but is ultimately for the benefit of and to the credit of the recipient of the income on whose behalf that tax is payable does not in any manner alter the **character of the payment**, namely, its **character as income tax**.

6. Learned counsel for the Revenue submitted placing strong reliance on the recent decision of the Supreme Court in the case of ***Bharat Commerce & Industries Ltd. vs. CIT (1998) 145 CTR (SC) 340 : (1998) 230 ITR 733 (SC) : TC S17.1878*** that payments required to be made by way of income-tax under the IT 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 s. 37 of the Act. In that case the question considered was as to whether interest paid on delayed payment of income-tax and surtax by way of installments, on income voluntarily disclosed under the Voluntary Disclosure of Income and Wealth Act, 1976, is not in any way an expense incurred wholly or exclusively for the purpose of the assessee's business. The Court held that (head note) :

"When interest is paid for committing a default in respect of the statutory liability to pay advance tax, the amount paid and the expenditure incurred in that connection is **not** in any way connected with preserving or promoting the business of the assessee. The liability in the case of payment of income-tax and interest for delayed payment of income-tax or advance tax arises in the computation of the profits and gains of business".

The Court further held that:

"Under the IT Act, the payment of such interest is inextricably connected with the assessee's tax liability. If income-tax itself is not a permissible deduction under s. 37, any interest payable for default committed by the assessee in discharging his statutory obligation under the IT Act, which is calculated with reference to the tax on income, cannot be allowed as deduction".

Before holding so, the Court considered the decision of the apex Court in the case of ***Mahalakshmi Sugar Mills Co. vs. CIT (1980) 16 CTR (SC) 198: (1980) 123 ITR 429 (SC): TC 17R.877*** a decision rendered by three learned Judges of the apex Court and held that the ratio of that judgment had no application to the case before it in the case of *Bharat Commerce & Industries Ltd. vs. CIT* (supra). The assessee in the case of *Mahalakshmi Sugar Mills Co.* (supra), had claimed deduction of ***interest paid on arrears of sugarcane cess***. The payment of sugarcane cess, as it was observed by the Court in the case of *Bharat Commerce & Industries* (supra), is very much a part of the assessee's business expense and any interest on arrears of cess would, therefore, take colour from the cess which is payable, that it was an indirect tax which had to be paid in the course of carrying on business.

7. Learned counsel for the assessee placed reliance on the judgment of the apex Court in the case *Mahalakshmi Sugar Mills Co. (supra)*. As pointed out by the apex Court in its later judgment in the case of *Bharat Commerce & Industries (supra)*, the cess which was considered in the case of Mahalakshmi Sugar Mills Co. (supra) was an indirect tax payable in the course of the business of the assessee and the interest paid on the arrears of the cess took colour from the cess which was paid.

8. Learned counsel for the Revenue also referred to the decisions of the *Bombay High Court in the case of Ferro Alloys Corpn. Ltd. vs. CIT (1992) 196 ITR 406 (Bom) : TC 17R.817* and the decision of the *Calcutta High Court in the case of Martin & Harris (P) Ltd. vs. CIT (1994) 73 Taxman 555 (Cal)*. It was held in those cases that the interest paid under s. 201(1A) of the Act was not deductible as business expenditure under s. 37 of the Act.

9. 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 IT Act. The interest paid under s. 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.

10. 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 *Mahalakshmi Sugar Mills Co. (supra)* also relied on the decision of the apex Court in the cases of -

Prakash Cotton Mills (P) Ltd. vs. CIT (1993) 111 CTR (SC) 389 : (1993) 201 ITR 684 (SC) : TC 17R.746,

Malwa Vanaspati & Chemical Co. vs. CIT (1997) 42 CTR (SC) 137 : (1997) 225 ITR 383 (SC) : S17.1860 and

CIT vs. Ahmedabad Cotton Manufacturing Co. Ltd. (1993) 115 CTR (SC) 401 (1994) 205 ITR 163 (SC) : TC 17R.848.

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.

11. 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 & Industries (supra)*, 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.”

39. Since, this is the **only** judgment of the Hon'ble **High Court** {**Chennai Properties and Investment Ltd., 239 ITR 435 (Mad)**} brought to our notice and no contrary decision of any High Court has been cited by from the side of the assessee, therefore, as **judicial precedence** we are persuaded to follow the same and accordingly, we hold that such an interest on late payment of deposit of TDS cannot be allowed as expenditure u/s. 37. Consequently, this issue is decided against the assessee. Department's appeal.

### Comments on adverse the decision of ITAT, Delhi

59. The decision if the case of DLF Ltd. (*ITAT, Delhi supra*) is distinguishable from the decisions of club of ITAT Kolkata, Mumbai and Bangalore.
60. In the cases before ITAT Kolkata, Mumbai and Bangalore, the issue was allowance of deduction of interest paid u/s 201(1A) of the Act on late payment of TDS as business expense u/s 37(1) to compute income from profits and gains of business or profession chargeable u/s 28 of the Act.
61. Whereas, in the case before ITAT, Delhi in DLF case interest of Rs. 28,79,372/- paid on late deposit of TDS was claimed against interest of Rs. 30,31,199/- received on income tax refund. Interest on income tax refund of Rs. 30,31,199/- was credited in the account of “interest paid others – Income Tax” and was adjusted against the interest paid on late payment of TDS of Rs. 28,79,372/- and only the balance amount has been offered as interest income. Thus, in this manner, interest paid on late payment of TDS has been claimed as expenditure u/s 37 of the Act.
62. ITAT, Delhi observed that ***even though we may be persuaded by such a reasoning, however,*** relied on the decision of Hon'ble Madras High Court in the case of Chennai Properties and Investment Ltd., 239 ITR 435 (Mad) ***following the principle of judicial precedence observing that this being the only decision of High Court on the issue.***
63. It means that though Hon'ble ITAT Delhi was in agreement with the reasons and rational advanced for allowance of such interest as deduction u/s 37(1), yet because of the principle of judicial precedence the decision of Hon'ble Madras High Court in the case of ***Chennai Properties and Investment Ltd. (supra.)*** was followed, being the only High Court decision cited before the Court.
64. In the case of ***Chennai Properties and Investment Ltd. (supra.)***, though the issue involved was allowance of deduction of Rs.10,542/- paid u/s 201(1A) on account of interest on late payment of TDS as business expense u/s 37(1), yet the Madras High Court placed reliance on the following two decisions of High Court:

- (i) **Ferro Alloys Corporation Ltd. v. CIT [1992] 196 ITR 406 (Bom.)**
- (ii) **Martin and Harris Pvt. Ltd. v. CIT [1994] 73 Taxman 555 (Cal.)**

65. 65.1 In the case of **Ferro Alloys Corporation Ltd. v. CIT [1992] 196 ITR 406 (Bom.)** the issue was allowance of deduction of interest paid as follows:

(i)	Interest paid u/s 220(2)	Rs. 6,03,168/-
(ii)	Interest paid u/s 215	Rs. 1,38,506/-
(iii)	Interest paid u/s 201(1A)	Rs. 66,590/-

65.2 In this case the Income-tax Officer, the Commissioner in first appeal and the Tribunal in second appeal rejected the said claim as not allowable u/s 37 and the Hon'ble Bombay High Court also held against assessee by following decisions:

- (i) **Aruna Mills Ltd. v. CIT (1957) 31 ITR 153 (Bom.)**
- (ii) **CIT v. Ghatkopar Estate & Finance Corporation (P) Ltd. (1989) 177 ITR 222 (Bom.)**
- (iii) **Bharat Commerce Industries Ltd. v. CIT (1989) 180 ITR 37 (Delhi)**

65.3 However, it is imperative to examine whether the above decision are comparable to the issue under consideration, *i.e.* whether interest paid u/s 201(1A) is allowable as business expense u/s 37(1).

65.4 In the case of **Aruna Mills Ltd. v. CIT (1957) 31 ITR 153 (Bom.)** the issue was about the allowability of interest Rs. 4,554/- paid by the assessee u/s 18A of the Income Tax Act, 1922 for short payment of advance tax, against interest Rs. 7,519/- received as refund on account of excess payment of advance tax u/s section 18A of the said Act. So, the claim of interest was in respect of tax on income of the assessee, whereas in the issue under consideration the interest relates to TDS and such tax is on the income of the other person, *i.e.* the deductee. The interest on TDS is paid in discharge of statutory liability inextricably connected with the business of the assessee (deductor).

***Therefore, this decision does not go against the issue under discussion.***

65.5 In the case of **CIT v. Ghatkopar Estate & Finance Corporation (P) Ltd. (1989) 177 ITR 222 (Bom)** the following question was referred:

"Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that **interest of Rs. 15,237/- for delayed payment of income-tax** is a deductible expenditure in computing the profits and gains within the meaning of sections 28 and 37 of the Income-tax Act, 1961?"

The amount of Rs. 15,237/- was paid to the Income-tax Department for allowing the assessee to make payment of its taxes in installments. The claim for deduction of this amount, *i.e.*, Rs. 15,237, was rejected by the Income-tax Officer observing that interest on income-tax paid being **penal in nature** not admissible.

The Court held that what has been done is that interest has been paid to the Department for allowing the assessee to make payment of income-tax already

levied with reference to the income earned. Considered from this point of view. it will not be quite correct to say that this payment of interest to a person from whom money has been borrowed was to earn income as the tax is levied **after** the income is earned **and not before** it, as held by this court as far back as in *Bai Bhuriben Lallubhai v. CIT [1956] 29 ITR 543*, **income-tax** is a **personal liability**.

***Therefore, this decision also does not go against the issue under discussion.***

- 65.6 In the case of *Bharat Commerce Industries Ltd. v. CIT (1989) 180 ITR 37 (Delhi)* the following question was referred to the High Court:

*"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?"*

- 65.7 In the case of the assessee contends that the taxes which were payable were delayed and to that extent the assessee's financial resources increased. These increased resources became available for business purposes. Hence the interest which is paid to the Government under **Section 139** and **215** represent, in effect, **interest on capital that would have been borrowed** by the assessee otherwise. Hence these amount should be allowed as deduction under **Section 37** as expenses incurred wholly and exclusively for the purpose of its business. This contention of the assessee was rejected.
- 65.8 This case did not pertain to interest on TDS u/s 201(1A). It pertained to interest u/s 139 and 215, both of which relates to tax on income of the assessee (deductor), whereas in the issue under discussion, interest u/s 201(1A) relates income of other person (deductee) *i.e.* the deductee. The interest on TDS is paid in discharge of statutory liability inextricably connected with the business of the assessee (deductor).

***Therefore, this decision also does not go against the issue under discussion.***

66. 66.1 *In Martin & Harris (P) Ltd. v. CIT [1994] 73 TAXMAN 555 (Cal)*, for the assessment year 1977-78, the assessee-company claimed deduction of a sum of Rs. 35,769/- being the expenditure incurred for the payment of interest **under section 201(1A)** on the amount of tax which was not deposited within the stipulated time after deducting the same from the salaries paid to its employees. The Assessing Officer disallowed the claim on the grounds, inter alia, that **income-tax** being a disallowable item, interest thereon could not be allowed and that the **interest was in the nature of penalty for infraction of law** and, hence, inadmissible. On appeal, the Commissioner (Appeals) as well as the Tribunal upheld the finding of the Assessing Officer. On reference, the Hon'ble High Court held that interest paid by company under section 201(1A) for delayed payment of tax deducted at source from employees' salary, is **not** allowable as deduction in computation of total income.

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- 66.2 In the above case the interest paid u/s 201(1A) was held in the nature of penalty for infraction of law, which is not the correct law.
- 66.3 **Section 271C(1)(a)** of the Act separately provides **penalty** for non deduction of TDS as required by or under the provisions of Chapter XVIIB of the Act.
- 66.4 Section 276B(a) of the Act provides **prosecution** where a person fails to pay to the credit of the Central Government the tax deducted at source by him as required by or under the provisions of Chapter XVIIB of the Act.
- 66.5 Thus, where separate provisions are provided for penalty and prosecution for non deduction and payment of TDS not in accordance with law, then how the interest can be in the nature of penalty. This issue is no more *res integra*. In the following the Apex Court has held that liability for interest which had been incurred by the assessee therein was regarded as **compensatory in nature** and allowable as business expenditure.
- (i) Lachmandas Mathuradas vs. CIT 254 ITR 799 (SC)
  - (ii) Mahalakshmi Sugar Mills Co. vs. CIT (1980) 123 ITR 429 (SC)
  - (iii) Prakash Cotton Mills (P) Ltd. vs. CIT (1993) 201 ITR 684 (SC)
  - (iv) Malwa Vanaspati & Chemical Co. vs. CIT (1997) 225 ITR 383 (SC)
  - (v) CIT vs. Ahmedabad Cotton Manufacturing Co. Ltd. (1994) 205 ITR 163 (SC)

***Therefore, this decision also does not go against the issue under discussion.***

67. Therefore, the decision of Hon'ble ITAT in the case of DLF Ltd. (*supra*) does not express correct law in this regards. Therefore, in view of above exposition the decision in the case of DLF Ltd. (*supra*) need reconsideration. It cannot be applied by ignoring the decisions of ITAT Kolkata, Bombay and Bangalore as discussed above.

## Conclusion

68. Tax deducted at source in accordance with the provisions of Chapter-XVIIB of the Act in the month of **March, 2020** was required to be paid u/s 200(1) and 200(2) of the Act r.w. Rule 30 of the Income Tax Rules, 1962 **on or before 30.4.2020**, failing which interest is payable u/s 201(1A) of the Act @ 1% for every month or part of a month or @1.5% for month or part of a month, as the case may be, which has now been reduced to 0.75% vide the Ordinance dated 31.3.2020.

69. The deductors could not pay the TDS of March, 2020 due to pronouncement of Janta curfew on 22.3.2020 and thereafter lockdown 1.0 *w.e.f.* 24.3.2020 due to outbreak of Covid-19, which has been extended up to 17.5.2020 under lockdown 2.0. and lockdown 3.0. These lockdowns have been declared *vide* the orders of Ministry of Home Affairs of the Government of India and National Disaster Management Authority. ***Any violation of the Orders can render the violators liable for fine, police arrest and prosecution.***
70. Therefore, even the willing deductors could not pay the amounts of TDS pertaining to March, 2020 by the due date 30.4.2020.
71. Similarly, TDS for the month of April, 2020 was due to be paid by 7.5.2020, which could not be paid due to extension of lockdown till 17.5.2020.
72. Under these circumstances, the business community, the deductors, would be liable to pay interest u/s 201(1A) of the Act. ***They will be at double disadvantage, besides the loss of business revenue.***
73. The **first disadvantage** is that, they will have to ***bear the expense of interest***, which will diminish their income or increase their loss, whereas the related amount of tax is not tax on their income. In fact a deductor discharges a social duty towards the country which is made statutory under the Act as he helps the government to collect tax under the principle of ***“pay as you earn”***. The amount of TDS is in fact tax on the income of the other person (the deductee) by virtue of the provisions of section 199 and he gets its credit u/s 200 of the Act. By virtue of the provisions of 4(2) of the Act r.w. the provisions of Chapter XVIIIB of the Act, an assessee carrying on business or profession makes payments towards salary, interest, payment for carrying out any work in consequence of a contract, freight, commission, brokerage, fee for professional service, fee for technical service, royalty, dividend *etc.* in the course of carrying on the business or profession **and** for the purpose of the business or profession, the income of which is chargeable to tax u/s 28 of the Act. Therefore, **the activities** of incurring such expenses, accounting such expenses, making payment of such expenses, deducting tax thereon in accordance with the provisions of the Act, making payment of the tax so deducted in accordance with the provisions of the Act **and making belated payment of the tax so deducted along with interest u/s 201(1A) of the Act** are all ***inextricably connected to the purpose of the business as envisaged in section 37(1) of the Act.*** *It fact the interest on TDS is paid in discharge of statutory liability inextricably connected with the business of the assessee (deductor).*
74. The **second disadvantage** is that, if such interest is not allowed as business expense, the deductor will be required to pay tax thereon, **as if** such interest is the interest on his own income, which in fact is not.
75. ***This is not fair.*** Under the present circumstances of lockdown the assesses (deductors) are forced to stay at home, not to open their business establishment. Therefore, the default of payment of TDS is bond happen, but for no fault of the assessee (deductor).
76. It may not be out of place to mention that the concept of TDS is different from the concept of TCS or collection of ESI or PF contribution of employees from their salary or wages. In TCS and ESI/PF specific amount is collected from the other person, which is due to be paid to the government. Whereas, in the case of TDS, the business entity

following mercantile system of accounting just provide for an expense and credits one component to “the creditor” and credits the other component of TDS to “TDS payable account”. This amount of TDS he is required to be paid of his own resources, irrespective of the fact whether the amount from which it is deducted has been paid or not. For example, generally interest on unsecured loan is credited to the account of the depositor and it is not necessary it must be paid, whereas tax deducted thereon is to be paid within the stipulated time. This amount of tax is paid by the deducted out of his resources. Some time he has to borrow funds to discharge this statutory business obligation, bearing interest, in order to save the interest payable u/s 201(1A). If he does not borrow, he may default in payment of TDS resulting into interest u/s 21(1A). Therefore, the liability of interest is a business liability which an assessee incurs in discharge of his statutory business obligation. Thus any interest paid u/s 201(1A) is business expense allowable u/s 37(1) of the Act.

76. Finally, in the case of *indirect taxes*, e.g. service tax, value added tax (VAT), excise duty, commercial cess, sales tax, central sales tax, goods and services tax (GST) etc. manufacturer / trader makes sales and collect taxes for the Government. As soon as he credits the sales, he credits the related tax amount also. It becomes his statutory liability towards the Government, irrespective of the fact whether he has received the payment of the goods so sold. Out of the total such liability the manufacturer / trader might have received payment towards the sales and the tax. Under the respective statutes, such taxes are required to be paid in specified / prescribed time lines. In case of delay, interest is required to be paid under the provisions of the respective statute. It is now settled law under Article 141 of the Constitution, such interests are allowable as business expenses under section 37(1) of the Act, despite the fact that the manufacturer / trader might have collected the amount of tax, might have used it for the purpose of his business, but still interest on its payment for the period of delay is allowable as business expense. Whereas, in the case of the deductor is required to use his own money to pay the TDS, hence allowable.

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