

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, JAIPUR

श्री विजय पाल राव, न्यायिक सदस्य एवं श्री भागचंद, लेखा सदस्य के समक्ष
BEFORE: SHRI VIJAY PAL RAO, JM & SHRI BHAGCHAND, AM

आयकर अपील सं./ITA No. 975 & 1012/JP/2017
निर्धारण वर्ष / Assessment Years : 2004-05 & 2005-06

Deputy Commissioner of Income Tax, Circle-6, Jaipur.	बनाम Vs.	M/s Rajasthan Rajya Vidyut Utpadan Nigam Ltd., Vidyut Bhawan, Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AABCR 7436 B		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

राजस्व की ओर से / Revenue by : Smt. Richa Khoda (CIT)
निर्धारिती की ओर से / Assessee by : Shri P.C. Parwal (CA)

सुनवाई की तारीख / Date of Hearing : 27/02/2018
उदघोषणा की तारीख / Date of Pronouncement : 27/02/2018

आदेश / ORDER

PER: BENCH

Both these appeals are filed by the revenue emanates from the two separate orders of the Id. CIT(A), Bikaner both dated 29/08/2017 and 29/09/2017 for the A.Ys. 2004-05 & 2005-06 respectively. In both these appeals, the revenue has taken following grounds of appeal:

Grounds of ITA No. 975/JP/2017

- (i) Whether on the facts in the circumstances of the case and in law the Id. CIT(A) was justified in deleting the addition of Rs. 3,60,26,390/- made by the AO for depositing the employee's contribution to PF & ESI beyond the prescribed time limit provided in respective Acts.

- (ii) *Whether on the facts in the circumstances of the case and in law the Id. CIT(A) was justified in holding that employee's contribution to PF & ESI are governed by the provision of section 43B and not by section 36(1)(va) r.w.s. 2(24)(x) of the I.T. Act."*
- (iii) *Whether on the facts in the circumstances of the case and in law the Id. CIT(A) was justified in deleting the addition of Rs. 6,44,143/- made on account of prior period expenses without appreciating the fact that the assessee has failed to produce bills and vouchers amounting to Rs. 6,44,143/- out of Rs. 31,20,68,106/- and that dispute is not with regard to year of admissibility but non verifiable nature of expenses."*

Grounds of ITA No. 1012/JP/2017

- (i) *Whether on the facts in the circumstances of the case and in law the Id. CIT(A) was justified in deleting the addition of Rs. 3,72,95,533/- made by the AO for depositing the employee's contribution to PF & ESI beyond the prescribed time limit provided in respective Acts.*
- (ii) *Whether on the facts in the circumstances of the case and in law the Id. CIT(A) was justified in holding that employee's contribution to PF & ESI are governed by the provision of section 43B and not by section 36(1)(va) r.w.s. 2(24)(x) of the I.T. Act.*
- (iii) *Whether on the facts in the circumstances of the case and in law the Id. CIT(A) was justified in deleting the disallowance of Rs. 1,31,473/- made u/s 40(a)(ia) on account late deposition of TDS and observing that amendment to section 40(a)(ia) made by the finance Act 2010 was retrospective in nature."*

2. Grounds No. 1 and 2 of both these appeals are on the same issue wherein the Id. CIT(A) has deleted the addition made by the Assessing Officer for depositing the employees contribution to PF & ESI beyond the prescribed time limit provided under the respective Act. The Id. CIT(A) has granted the relief by holding as under:

“2.3 I have considered the facts of the case and the submissions made. It is seen that the assessee has deposited the contribution towards CPF, GPF, EPF and ESI before the due date of filing of the income tax return. The decision of Rajasthan High Court relied by the Ld. AR supports the case of the appellant wherein it is held that if Employee’s contribution towards PF, if paid after the due date under the respective Acts but before filing of return of income U/s 139(1), cannot be disallowed U/s 43B or U/s 36(1)(va) of the Act. During the course of appellate proceedings, the appellant submitted that ESI & PF were deposited with in the Financial year and hence deduction could not be denied in view of decisions of various courts, ratio of which have held that payment of ESI and PF before the due date of filing of return of income is an allowable deduction. On overall appreciation of the facts, I tend to agree with the appellant’s claim. The Hon’ble Supreme Court in case of CIT vs. Alom Extrusions Ltd. reported in 319 ITR 306 held that omission of second proviso to sec 43B and the amendment of first proviso by Finance Act, 2003, bringing about uniformity in payment of tax, duty, cess and fee on one hand and contribution to employees’ welfare funds on the other, are curative in nature, and thus, effective retrospectively w.e.f. 1-4-88 i.e. the date of insertion of first proviso. It was further held that where Provident Fund and Employees State Insurance Contribution were paid by the assessee before filing of the return and proof of payment was submitted before the Assessing Officer, the amounts were deductible as deduction.

The Hon’ble Delhi High Court in case of CIT vs. Aimil Ltd & Ors. reported in 321 ITR 508 held as under:

“As soon as employees’ contribution towards PF or ESI is received by the assessee by way of deduction or otherwise from the salary/ wages of the employees, it will be treated as ‘income’ at the hands of the assessee. It

clearly follows there from that if the assessee does not deposit this contribution with PF/ESI authorities, it will be tax as income at the hands of the assessee. However, on making deposit with the concerned authorities, the assessee becomes entitled to deduction under the provisions of s. 36(1)(va). Sec. 43B(b), however, stipulates that such deduction would be permissible only on actual payments. This is the scheme of the Act for making an assessee entitled to get deduction from income insofar as employees' contribution is concerned. Deletion of the second proviso has been treated as retrospective in nature and would not apply at all. The case is to be governed with the application of the first proviso. If the employees' contribution is not deposited by the due date prescribed under the relevant Acts and is deposited late, the employer not only pays interest on delayed payment but can incur penalties also, for which specific provision are made in the Provident Fund Act as well as the ESI Act. Therefore, the Acts permit the employer to make the deposit with some delays, subject to the aforesaid consequences. Insofar as the I T Act is concerned, the assessee can get the benefit if the actual payment is made before the return is filed. - CIT vs. Vinay Cement Ltd. (2007) 213 CTR (SC) 268, CIT vs. Dharmendra Sharma (2007) 213 CTR (del) 609 : (2008) 297 ITR 320 (Del) and CIT vs. P. M. Electronics Ltd. (2008) 220 CTR (del) 635: (2008) 15 DTR (del) 258 followed."

Apart from the above decisions, the following decisions are also applicable on the issue at hand:-

- i. Dy CIT vs. Orbit Resorts (P) Ltd (48 SOT 23 (URO)*
- ii. ACIT vs. Ranabaxy Laboratories Ltd. (2011) 7 ITR (Trib) 161 (DLH)*
- iii. ACIT vs. M/s. Anil Special Steel Industries Ltd. (decision of Jaipur Bench in ITA No. 1100/JP/2011)*

From the above decisions, it is clear that payment or contribution made to the provident fund authority any time before filing of the return for the year in which the liability to pay accrued is an allowable expenditure. Likewise, in the present case, the employees' contribution was deposited by the appellant before due date for filing of return of income, therefore, in view of the decision of the Hon'ble

Supreme. Court in the case of CIT vs. Alom Extrusions Ltd (supra) and decision of the Hon'ble Delhi High Court in the case of CIT vs. Aimil Ltd & Ors (supra), the payments made before due date for filing of return of income are allowable. The AO is directed to verify the dates of payment of employee's contribution towards PF and ESI and delete the addition made on this account if the payments have been made before the due date of filing of return of income by the appellant. Considering the factual and legal position as discussed above, the AO is directed to verify and allow as per law. This ground of appeal is allowed."

3. The Bench have heard both the sides on this issue. Since the issue involved in these appeals is covered by the decision of the Hon'ble Jurisdictional High Court and the Id. CIT(A) has relied on the same for granting relief to the assessee, therefore, we sustain the order of the Id. CIT(A) on this issue and dismiss the grounds No. 1 and 2 of both these appeals.

4. In the ground No. 3 of ITA No. 975/JP/2017, the issue involved is deleting the addition of Rs. 6,44,143/- made on account of prior period expenses. The Id. CIT DR has submitted that the Id. CIT(A) has granted relief to the assessee that some of the expenses remained unadjusted for want of necessary approval but no such evidence is filed before the A.O.. If any evidence filed before the Id. CIT(A) then the A.O. has not been provided any opportunity of being heard. On the

query from Bench to Id. AR of the assessee regarding what are the evidences on the basis of which such finding have been recorded by the Id. CIT(A), he was also not able to produce or state about any such record during hearing of appeal. However, he further submitted that the matter may be restored back to the file of the Assessing Officer to verify the details of such necessary approvals due to which such amounts remained unadjusted.

5. After considering the pleadings of both the sides and in the interest of justice and equity, we find it appropriate to restore this issue to the file of the Assessing Officer to be decided de novo. The assessee is directed to produce all necessary documents/evidences before the Assessing Officer to decide the issue.

6. In the ground No. 3 of ITA No. 1012/JP/2017, the issue involved is deleting the disallowance of Rs. 1,31,473/- made U/s 40(a)(ia) of the Income Tax Act, 1961 (in short the Act) for late deposition of TDS by observing that amendment to Section 40(a)(ia) made by the Finance Act, 2010 was retrospective in nature. The Id. CIT(A) has granted relief to the assessee by holding as under:

“5.3 I have gone through the facts of the case and it is observed that the Hon'ble ITAT Ahemadad 'B' in case of Kanubhani Ramjibhai vs. ITO, reported in 49 DTR (Ahd) (Trib) 70 has held that amendments brought out in sec. 40(a)(ia) from time to time were clarificatory and

when an amendment is declaratory and clarificatory in nature, the presumption against its being retrospective is not applicable. It is no doubt true that ordinarily a statute, and particularly when the same has been made applicable with effect from a particular date should be constituted prospectively and not retrospectively. But this principle will not be applicable in a case where the provision construed is merely explanatory, clarificatory or declaratory. It cannot be disputed that the object of explanation is to explain the meaning and intendment of the Act itself. The provisions of sec. 40(a)(ia) have been amended by the Finance Act, 2010 w.e.f 1-4-2010 which are remedial in nature, designed to eliminate unintended consequences which may cause undue hardship to the taxpayers and which made the provision unworkable or unjust in a specific situation, and is of a clarificatory nature and therefore, has to be treated as retrospective w.e.f. 1-4-2005, the date on which sec. 40(a)(ia) has been inserted by the Finance Act, 2004. In view of decision dated 3-12-2010 of the Hon'ble ITAT Ahemdabad B Bench.

Similar finding is given by the Hon'ble ITAT Benches "G", Mumbai in Golden Stables Lifestyle Centre Pvt. Ltd. vs. CIT in ITA No. 5145/Mum/2009 for AY 2005-06 order dated 30-9-2010, reported in 2010-TIOL-596-ITAT - Mum, by taking note of ratio of the Hon'ble Supreme Court in case of CIT vs. Alom Extrusions Ltd., reported in 319 ITR 306. It is further observed that amendment brought about to first proviso by the Finance Act, 2010, extends the time limit for all TDS payable throughout the year and it is a curative major which would apply to earlier years also.

In view of the decision dated 3-12-2010 of the Hon'ble ITAT Ahemdabad B Bench, as cited supra and in view of the foregoing

discussion, no disallowance u/s 40(a)(ia) is therefore, required to be made. The ground of appeal is allowed.”

7. After hearing both the sides on this issue we observe that this issue is also covered in favour of the assessee and the Id. CIT(A) has granted relief to the assessee relying on the decision of ITAT Mumbai in the case of Golden Stables Lifestyle Centre Pvt. Ltd. Vs CIT (supra) and the decision of Hon'ble Supreme Court in the case of CIT Vs Alom Extrusions Ltd. (supra), therefore, we sustain the order of the Id. CIT(A) on this issue.

8. In the result, ITA No. 975/JP/2017 is partly allowed for statistical purposes only and ITA No. 1012/JP/2017 is dismissed.

Order pronounced in the open court on 27/02/2018.

Sd/-
(विजय पाल राव)
(VIJAY PAL RAO)
न्यायिक सदस्य / Judicial Member

Sd/-
(भागचंद)
(BHAGCHAND)
लेखा सदस्य / Accountant Member

जयपुर / Jaipur
दिनांक / Dated:- 27th February, 2018

*Ranjan

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- The DCIT, Circle-6, Jaipur.
2. प्रत्यर्थी / The Respondent- M/s Rajasthan Rajya Vidyut Utpadan Nigam Ltd., Jaipur.
3. आयकर आयुक्त / CIT

4. आयकर आयुक्त(अपील)/The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर/DR, ITAT, Jaipur
6. गार्ड फाईल/ Guard File (ITA No. 975 & 1012/JP/2017)

आदेशानुसार/ By order,

सहायक पंजीकार/Asst. Registrar