

आयकर अपीलिय अधीकरण, न्यायपीठ – “D” कोलकाता,  
**IN THE INCOME TAX APPELLATE TRIBUNAL  
KOLKATA BENCH “D” KOLKATA**

Before **Shri Aby T. Varkey, Judicial Member** and  
**Dr.A.L. Saini, Accountant Member**

**ITA No.207/Kol/2017**  
Assessment Year :2013-14

<b>ACIT, Central Circle-1(1), Aaykar Bhawan, Poorva, 110, Shantipally, 3<sup>rd</sup> Floor, Kolkata-700 107</b>	<b>V/s.</b>	<b>M/s Adhunik Alloys &amp; Power Ltd., 14, N.S. Road, 2<sup>nd</sup> Floor, Kolkata-700 001</b>
<b>[PAN No.AAECA 5290 R]</b>		
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

अपीलार्थीकी ओर से/By Appellant	Shri Arindam Bhattacharjee, Addl. CIT-DR
प्रत्यर्थी की ओर से/By Respondent	Mrs. Shikha Agarwal, ACA
सुनवाई की तारीख/Date of Hearing	05-03-2018
घोषणा की तारीख/Date of Pronouncement	16-03-2018

**आदेश/O R D E R**

**PER Dr. A.L. Saini, AccountantMember:-**

This caption appeal filed by the Revenue, pertaining to Assessment Year2013-14, is directed against the order passed by Ld. Commissioner of Income Tax (Appeals)-20, Kolkata,in appeal No.1042/CIT(A)/20/CC-1(1)/15-16, dated 10.11.2016, which in turn arises out of an order passed by Assessing Officer u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as ‘the Act’) dated 31.07.2015.

2.The Revenue has raised following grounds of appeal:-

*“1) Ld. CIT(A) erred in facts as well as in law by deleting the disallowance of Rs.26,31,856/- made for delay in deposit of employee’s contribution towards provident fund and ESI and allowing relief under*

*section 43B by failing to appreciate the fact that the provisions of employee's contribution is governed by the provisions of Section 36(1)(va) read with 2(24)(x).*

*2) Ld. CIT(A) erred in fact as well as in law by deleting the disallowance made u/s. 14A as no exempt income was earned by the assessee during the year, even though disallowance u/s. 14A can be made where the assessee is capable of earning exempt income and no exempt income has been earned by the assessee.*

*3) Ld. CIT(A) erred in facts as well as in law by deleting the addition u/s 14A made while computing the book profit, as appropriate adjustment for the expenditure incurred for earning exempt income has to be made as per the provisions of Section 115JB to arrive at the actual adjustment book profit.*

*4) The appellant craves the leave to make any addition, alteration and modification etc. of ground or grounds during the course of hearing of the appeal."*

**3. Ground No.1 raised by the Revenue relates to disallowance of ₹26,31,856/- made for delay in deposit of employees' contribution towards Provident Fund and ESI.**

3.1 Brief facts apropos this issue is that during the course of assessment proceeding, the Assessing Officer noted from the tax audit report of the assessee that assessee had collected contribution towards PF from the salaries of its employees. However, for the month of May, 2012, ₹7,14,354/-, July 2012 ₹7,01,260/- and March 2013, ₹7,09,221/- total contribution to ₹21,24,835/- and contribution towards ESI for the month of October, 2012 ₹1,55,707/-, December, 2012 ₹1,64,763/- and March, 2013 ₹1,86,551/- total amounting to ₹5,07,021/- was collected from employees and such collected amount had not been deposited to respective Govt. accounts within due dates. Therefore, Assessing Officer held that the provision of Section 2(24)(x) r.w.s. Sec. 36(1)(va) of the Act applies to the assessee, which states that any sum received by the assessee-company from its employees as contribution to the PF & ESI will be included as income of assessee, if it is not deposited on

or before the due date of deposit under the said Act. The Assessing Officer also observed that provision is clearly distinguishable from the provisions of Section 43B of the Act. Therefore, the Assessing Officer disallowed Rs.26,31,856/- ( ₹21,24,835/-, being belated payment of PF and ₹5,07,021/- and belated payment of ESI).

3.2. On appeal, the Ld. CIT(A) deleted the addition made by the Assessing Officer holding that assessee had deposited the PF and ESI amount in the Govt. account before the due date of the filing of return of income u/s 139(1) of the Act.

3.3 Not being satisfied with the order of Ld. CIT(A), the Revenue is in appeal before us. The Ld. DR for the Revenue has primarily reiterated the stand taken by the Assessing Officer, which we have already noted in our earlier para and is not being repeated for the sake of brevity. On the other hand, the Ld. counsel for the assessee defended the order passed by the Ld CIT(A).

3.4 We have given a careful consideration the rival submissions and perused the material available on record, we note that assessee has deposited the contribution of PF and ESI before due date of filing return of income. It is a well accepted legal position that employees' contribution to PF / ESI, if paid within due date of filing the return of income u/s 139(1) of the Act, the same is allowable expenditure irrespective of the fact that same was not deposited within due dates as prescribed within the relevant Act. The contribution towards PF is in the assessee's case consideration was made before due date of filing return of income u/s.139(1) of the Act for the year and as such, same is allowable a business expenditure. For that we rely on the judgment of Hon'ble Supreme Court in the case of *CIT vs. M/s Alom Extrusions Ltd. (2009)* 319 ITR 306 (SC), wherein it was held that the contribution towards provided fund vis-à-vis omission of second proviso to Section 43B – relaxation allowed by proviso to Section 43B was restricted only to tax, duty, cess and fee, and

did not apply to contributions to labour welfare funds. Since the second proviso resulted in implementation problems, it was deleted by Finance Act, 2003, thereby equating tax, duty, cess and fee with contributions to welfare funds. Thus, omission of second proviso and the corresponding amendment of first proviso by Finance Act, 2003, are curative in nature and are effective retrospectively w.e.f. 1<sup>st</sup>April, 1988 i.e., the date of insertion of first proviso. If the contention of the Department that the amendments are effective prospectively is accepted, it would cause hardship and invidious discrimination among the assessee. We also rely on the judgment of Hon'ble jurisdictional High Court in the case of *M/s Coal India Ltd.* ITA No.12 of 2015 dated 12.08.2015, wherein it was held that the amount paid for employees' contribution beyond due date was deductible by invoking the amended provisions of Section 43B of the Act, 1961. The same proposition was upheld by the Co-ordinate Bench of this Tribunal in the case of *M/s Vijay Shree Ltd.* ITA No.1091/Kol/2010, A.Y 2006-07, wherein it was held that the employees' contribution made towards PF before due date of filing of return is allowable expenditure. Therefore, we note that assessee has deposited PF/ESI in the Govt. account before due date of filing of return of income 139(1) of the Act, that being so, we decline to interfere the order of Id CIT(A), his order on this issue is hereby upheld and the appeal filed by the assessee on this issue is dismissed.

3.5 In the result, Revenue's appeal ( ground No.1), is dismissed.

**4. Ground No.2 raised by the Revenue relates to disallowance made u/s. 14A r.w.s. Rule 8D of IT Rules, 1962.**

4.1 Brief facts apropos this issue, are that during the course of assessment proceedings, the Assessing Officer noted that in spite of investment in assets likely to yield exempt income, the assessee did not exclude any amount as expense u/s.14A of the Act, in its return of income for the relevant year. Therefore as per Circular No 5 dated 11.02.2014, the Assessing Officer noted

that Rule 8D (2)(iii) is applied for determining the amount to be disallowed in the assessee's case and accordingly the Assessing Officer worked out the average value of investment and made the disallowance to the tune of ₹25,01,484/-.

4.2. On appeal, Ld. CIT(A) deleted the addition holding that during the Assessment Year under consideration, the assessee had not earned any exempt income.

4.3 Not being satisfied with the order of Ld. CIT(A), the Revenue is in appeal before us. The Ld. DR for the Revenue has primarily reiterated the stand taken by the Assessing Officer, which we have already noted in our earlier para and is not being repeated for the sake of brevity. On the other hand, Ld. counsel for the assessee has stated that assessee has not earned any exempt income during the year under consideration therefore no disallowance should be made.

4.4 We have given a careful consideration to the rival submissions and perused material available on record. We note that it is undisputed fact that assessee has not earned any exempt income during the assessment year under consideration. The Ld. counsel for the assessee has produced before us the balance-sheet, profit and loss account for the year ended 31.03.2013 wherein we noted that assessee has not earned any exempt income during the Assessment Year 2013-14. We note that Ld. DR has relied on the CBDT Circular which was also relied by the Assessing Officer to make the disallowance u/s. 14A of the Act. We are of the view that CBDT circulars are binding on the Department only and not on courts as has been held by the Hon`ble Supreme Court in the case of Navnit Lal C. Javeri 56 ITR 198 and UCO Bank 237 ITR 887.

We note that the position of law is very much settled by various judicial pronouncements on the said issue under consideration that where assessee has not earned any exempt income no disallowance u/s. 14A r.w.r 8D of the IT Rules, should be made. For that we rely on the Judgment of Hon'ble Delhi High Court in the case of *Cheminvest Ltd. vs. CIT* 317 ITD 33 (Del). That being so, we are declined to interfere in the order passed by the Ld. CIT(A) in deleting the aforesaid addition, his order on this issue is therefore upheld and the ground of Revenue is dismissed.

4.5 In the result, the appeal filed by the Revenue ( Ground No. 2) are dismissed.

5. Ground No. 3 is consequential in nature and does not require adjudication.

Order pronounced in the open court 16/03/2018.

Sd/-  
(Aby. T. Varkey)  
(Judicial Member)  
Kolkata,  
\*Dkp, Sr.P.S

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

दिनांक:- 16/03/2018 कोलकाता ।

**आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-**

1. अपीलार्थी/Appellant-ACIT, Central Circle-1(1), Aaykar Bhawan, Poorva, 110, Shantipally 3<sup>rd</sup> Floor, Kolkata-107
2. प्रत्यर्थी/Respondent-M/s AdhunikAlloys&Power Ltd.,14, N.S. Road, 2<sup>nd</sup> Floor, Kolkata-001
3. संबंधित आयकर आयुक्त/ Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कोलकाता/ DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

By order/आदेश से,

Sr. Private Secretary, Head of  
Office/DDO  
आयकर अपीलीय अधिकरण,  
कोलकाता ।