आयकर अपीलीय अधिकरण, 'बी' न्यायपीठ, चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL , 'B' BENCH, CHENNAI

श्री ए. मोहन अलंकामणी, लेखा सदस्य एवं श्री धुव्वुरु आर.एल रेड्डी, न्यायिक सदस्य के समक्ष

BEFORE SHRI A.MOHAN ALANKAMONY, ACCOUNTANT MEMBER AND SHRI DUVVURU RL REDDY, JUDICIAL MEMBER

आयकरअपीलसं./**I.T.A.No.2045/CHNY/2017**

(निर्धारणवर्ष / Assessment Year: 2012-13)

M/s. Ampo Valves India Pvt. Ltd., S.F. No.420, 6th Cross, Thanner Pandal, V.K. Road, Coimbatore - 641004.	Vs	The DCIT, Corporate Circle -2, Coimbatore
PAN: AAHCA8341E		
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/ Appellant by	:	Shri Hari Krishnan, ITP
प्रत्यर्थी की ओर से/Respondent by	:	Shri K. Ravi, JCIT

सुनवाई की तारीख/Date of hearing	:	08.03.2018
घोषणा की तारीख /Date of Pronouncement	:	15.05.2018

आदेश / O R D E R

Per A. Mohan Alankamony, AM:-

This appeal by the assessee is directed against the order passed by the Learned Commissioner of Income Tax (Appeals)-1, Coimbatore dated 29.05.2017 in Appeal No.09/16-17 for the assessment year 2012-13 passed U/s.143(3) r.w.s. 92CA(3) of the Act.

2. The assessee has raised the following grounds in its appeal;

(i) The Ld.CIT(A) has erred in confirming the order of the Ld.AO who had invoked the provisions of Section 37 of the Act, and thereby disallowed Rs.8,26,526/- being the penalty imposed by the RBI for furnishing incorrect particulars.

(ii) The Ld.CIT(A) has erred in confirming the order of the Ld.AO who had disallowed Rs.1,20,654/- towards belated payment of employees' contribution of ESI & PF as per the provisions of Section 2(24)(x) r.w.s. 36(1)(va) of the Act.

(iii) The Ld.CIT(A) has erred in confirming the order of the Ld.AO who had disallowed Rs.2,75,70,065/- towards non-deduction of TDS on professional fees paid to non-resident M/s. AMPO, Spain by invoking the provisions of Section 40(a)(ia) of the Act.

3. The brief facts of the case are that the assessee is a private limited company engaged in the business of manufacture and sale of industrial valves, filed its return of income for the assessment year 2012-13 electronically on 01.12.2012 declaring total income of Rs.1,31,57,150/- under normal provisions of the Act and book profit of Rs.2,34,69,881/- U/s.115JB of the Act. Initially the return was processed U/s.143(1) of the Act and subsequently the case was selected for scrutiny under CASS. Finally assessment order was

passed U/s.143(3) r.w.s 92CA(3) of the Act on 19.03.2016 wherein the Ld.AO made the above mentioned additions.

4. **Ground No. 2(i) : Disallowance of Rs.8,26,526/- being penalty levied by RBI:-**

During the course of scrutiny assessment proceedings, it was observed by the Ld.AO that the assessee had disallowed a sum of Rs.8,26,526/- towards penalty paid to RBI. However, in the income tax computation statement under the normal provisions the same was claimed as deduction. On query it was explained that the assessee had committed certain clerical mistakes in the form FCGPR submitted to the RBI and therefore the penalty was levied by the RBI for a sum of Rs.8,26,526/-. The Ld.AO opined that the explanation 1 to Section 37 of the Act would be applicable in the case of the assessee and therefore disallowed the same as allowable deduction. On appeal, the Ld.CIT(A) concurred with the view of the Ld.AO by observing that the payment was made due to an offense committed by the assessee and thereby confirmed his order.

4.1 At the outset, we don't find any merit in the order of the Ld.AO as well as the Ld.CIT(A) on this issue. From the facts of the case, it is apparent that the penalty was levied due to some clerical mistake

committed by the assessee in the form submitted before the RBI. The genuine clerical mistake committed by the assessee cannot be treated as an offense under the Banking Regulations Act. Therefore we are of the view that explanation 1 to Section 37 of the Act will not be attracted in the case of the assessee. Hence we hereby direct the Ld.AO to delete the addition of Rs.8,26,526/-.

5. **Ground No. 2(ii) : Disallowance of Rs.1,20,654/- for belated payment of ESI & PF:-**

During the course of scrutiny assessment proceedings, it was observed by the Ld.AO that the assessee had not remitted the employees contribution to Provident & ESI fund amounting to Rs.1,20,654/- within the due date of the relevant Act. Therefore invoking Section 2(24)(x) r.w.s. 36(1)(va) of the Act, the Ld.AO disallowed the same as deduction and added to the income of the assessee. While doing so, the Ld.AO relied in the decision of the Hon'ble Kerala High Court in the case CIT Vs. Merchem Ltd., reported in 61 taxmann.com page 119 and the decision of the Hon'ble Gujarat High Court in the case CIT Vs. Gujarat State Road Transport Corporation reported in 41 taxmann.com page 100 (366 ITR 170). On appeal, the Ld.CIT(A) confirmed the order of the Ld.AO.

5.1 At the outset we do not find any infirmity in the orders of the Ld.Revenue Authorities on this issue. On the identical issue, the Chennai Bench of the Tribunal has also held the issue in favour of the Revenue in ITA No.2105/Mds/2015 vide order dated 21.06.2017. The gist of the order is reproduced herein below for reference:-

"5.2 I have heard the rival submissions and carefully perused the materials available on record. We do not find any merit in the submission of the assessee on this issue. Section 36(1)(va) of the Act specifically provides that if the assessee remits the ***employee's contribution to Provident Fund*** *within the due date mentioned in the* ***relevant Act P.F Act****, then the deduction will be allowable. The relevant portions of Section 36(1)(va) is reproduced herein below for reference:-*

> *36(1)(va) any sum received by the assessee from any of his employees to which the provisions of sub-clause (x) of clause (24) of section 2 apply, if such sum is credited by the assessee to the employee's account in the relevant fund or funds on or before the due date.*
>
> *Explanation:- For the purposes of this clause, "due date" means the date by which the assessee is required as an employer to credit an employee's contribution to the employee's account in the relevant fund under any Act, rule, order or notification issued there-under or under any standing order, award, contract of service or otherwise;*

Further Section 43B of the Act, only provides that deduction will be allowed with respect to ***employer's contribution*** *to provident fund if the same is remitted within the due date of filing the return of income. The relevant portion of Section 43B is extracted herein below for reference:-*

> ***"[Certain deduction tobe only on actual payment.] 43B*** *"notwithstanding anything contained in any other provisions of this Act, a deduction otherwise allowable under this Act in respect of ---*
> *(a)----------*
> *(b)* ***any sum payable by the assessee as an employer by way of contribution to any provident fund*** *or superannuation fund or gratuity fund or any other fund for the welfare of the employees"*
> *----------*

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provided that nothing contained in this section shall apply in relation to any sum which is actually paid by the assessee ***on or before the due date applicable in his case for furnishing the return of income under sub-section (1) of section 139*** *in respect of the previous year in which the liability to pay such sum was incurred as aforesaid and the evidence of such payment is furnished by the assessee along with such return."*

Thus ***Section 36(1)(va)*** *of the Act refers to* ***employee's*** *contribution to P.F while as* ***Section 43B*** *of the Act refers to* ***employer's*** *contribution to P.F, hence Section 43B of the Act has no application with respect to employee's contribution to P.F. Therefore Section 43B of the Act will not override the provisions of Section 36(1)(va) of the Act with respect to employee's contribution to provident fund. It is pertinent to mention that though employee's & employer's contribution to P.F are remitted by the employer, they are separate and distinct for which independent provisions have been cast under the Act. Employee's contribution to P.F., is nothing but appropriation of a portion of the salary which is legitimately due to the employee and remitted by the employer in the Government treasury on behalf of the employee in accordance with the provisions of the relevant P.F., Act. Hence it is crystal clear from* ***Section 36(1)(va)*** *of the Act that with respect to remittance of* ***employee's contribution to recognized Provident Fund,*** *deduction will be allowable to the assessee only if the same is remitted within the due date mentioned in the* ***relevant P.F. Act*** *and with respect to* ***employer's contribution to recognized Provident Fund***, ***Section 43B*** *of the Act makes it clear that deduction will be allowable if the remittance is made with in the due date of filing the return of income. For the above stated reasons I do not find any infirmity in the order of the Ld. Revenue Authorities. Accordingly, I confirm the Order of the Revenue Authorities on this issue.*

6. ***Ground No.ii: Belated remittance of Employees contribution towards ESI:-***

Since with respect to employee's contribution to ESI, provisions of Section 36(1)(va) of the Act apply by virtue of Section 2(24)(x) of the Act, the decision with respect to employee's contribution towards PF supra will hold good. Accordingly, this issue is also held against the assessee."

Following the ratio set by the Hon'ble higher judiciary cited by the Ld.Revenue Authorities and the above decision of the Tribunal, we hereby confirm the orders of the Ld.Revenue Authorities on this issue.

6. **Ground No. 2(iii) : Disallowance of Rs.2,75,70,065/- U/s. 40(a)(ia) of the Act for payments made to non-residents towards design and drawing charges without deducting tax:-**

During the course of scrutiny assessment proceedings, on perusal of annexure to Form 3CD, it was noticed by the Ld.AO that the Chartered Accountant had qualified in his report, out of professional charges paid to non-residents amounting to Rs.2,92,92,565/- a sum of Rs.17,22,500/- was disallowable U/s.40a(ia) of the Act. Thereafter relying on the Section 9(1)(vii) and explanation (2) to Section 195 of the Act, the Ld.AO held that the assessee was liable to deduct TDS for a sum of Rs.2,75,70,065/- being the amount paid / payable to the assessee's subsidy company abroad viz., M/s. Ampo, Spain for rendering technical assistance to the assessee company. Hence the Ld.AO invoked the provisions of Section 40(a)(ia) of the Act and disallowed the amount of Rs.2,75,70,065/- as allowable deduction. On appeal, the Ld.CIT(A) confirmed the order of the Ld.AO by observing as under:-

"8.1 On a perusal of the above five points, it clearly indicates that the Drawing and Designing charges paid by the appellant company are in the nature

of technical services and, therefore, the provisions of Section 9(1)(vii) read with Section 195 of the Act are attracted. The assessee company has failed to deduct TDS on the payment made to the extent of Rs.2,75,70,065/-. Therefore, disallowance made u/s.40(a)(ia) will stands confirmed in the hands of the appellant."

6.1 Before us the Ld.AR submitted the DTA agreement with Republic of Portuguese and referred to Article 12, wherein it was stated that the recipient of the remuneration received for technical knowledge in Portuguese will be liable to be taxed in India, if such technical knowledge is made available to the assessee. It was further submitted that in the case of assessee, no technical knowledge was made available to the assessee and therefore the recipient of the remuneration abroad is not liable to be taxed in India. Hence it was argued that the assessee is not liable to deduct TDS and accordingly provisions of Section 40(a)(ia) of the Act cannot be invoked. It was therefore pleaded that the addition made by the Ld.AO invoking the provisions of Section 40(a)(ia) of the Act may be deleted.

6.2 The Ld.DR on the other hand argued in support of the orders of the Ld.Revenue Authorities.

6.3 We have heard the rival submissions and carefully perused the materials available on record. On perusing the order of the Ld.Revenue Authorities, we find that they have not taken into consideration of the DTA agreement while deciding the issue. Therefore in the interest of justice we hereby remit the issue back to the file of Ld.AO for fresh consideration and to decide the matter in the light of the DTA agreement cited by the Ld.AO.

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

Order pronounced on the 15th May, 2018 at Chennai.

Sd/-	Sd/-
(**धुव्वुरु आर.एल रेड्डी**)	(**ए. मोहन अलंकामणी)**
(Duvvuru RL Reddy)	(A. Mohan Alankamony)
न्यायिक सदस्य /Judicial Member	लेखा सदस्य / Accountant Member

चेन्नई/Chennai,
दिनांक/Dated 15th May, 2018

RSR

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant 2. प्रत्यर्थी/Respondent 3. आयकर आयुक्त (अपील)/CIT(A)
4. आयकर आयुक्त/CIT 5. विभागीय प्रतिनिधि/DR 6. गार्ड फाईल/GF