

IN THE INCOME TAX APPELLATE TRIBUNAL  
AMRITSAR BENCH, AMRITSAR

BEFORE SH. SANJAY ARORA, ACCOUNTANT MEMBER AND  
SH. N.K.CHOUDHRY, JUDICIAL MEMBER

**ITA No.672(Asr)/2017**  
Assessment Year:2006-07

M/s. Emm Kay Industries Vs. Asst. CIT  
Limited Central Circle-II  
D-29, Focal Point, Jalandhar Jalandhar

PAN:AAACE 3104E

**(Appellant)**

**(Respondent)**

Appellant by: Sh. Sandeep Vijn (Ld. CA)  
Respondent by: Sh. Sandeep Chauhan (Ld. DR)

Date of hearing: 26.06.2018  
Date of pronouncement:05.07.2018

**ORDER**

**PER N.K.CHOUDHRY, JM:**

The instant appeal has been preferred by the Assessee/Appellant, on feeling aggrieved against the order dated 25.08.2017 passed by the Ld. CIT(A)-5, Ludhiana u/s 250(6) of the I.T. Act, 1961 (hereinafter called as 'the Act').

**2.** The assessee has raised the following grounds of appeal.

*"1. (a) The Learned Commissioner of Income Tax (Appeals), has erred in sustaining the order u/s 153A which is bad in law. No incriminating document having been found which pertained to this year and consequently the Assessing Officer could not have assumed jurisdiction u/s 153A. (Not Pressed)*

*1 .(b) Without prejudice to the above, the Learned Commissioner of Income Tax (Appeals) has erred in sustaining addition made in the*

order u/s 153A read with 143(3) which is not based on any incriminating document seized at the time of search. **(Not Pressed)**

2. *The Learned Commissioner of Income Tax(Appeals), has erred in sustaining the disallowance of Rs.1,78,356/- made by the Assessing Officer in respect of damages paid to ESI department by treating it as penalty not allowable as an expense. Even if the specific submissions on the disallowance were not accepted, the matter should have been restored to the file of the Assessing Officer to obtain necessary clarification from the ESI department, with regard to the exact nature of the amount in question.”*

**3.** The only consideration in the instant appeal relates to the disallowance of Rs.1,78,356/- which have been claimed as expenses by the assessee on account of ESI damages. It was submitted by the assessee before the AO that a part of this expenses were on account of interest payment whereas the remaining part was a penal in nature, however, the assessee could not file any documentary evidence with regard to his contention, therefore, the Assessing Officer disallowed the said expense by treating the same a penal in nature. The assessment was challenged before the Ld. CIT(A), who vide impugned order uphold the finding of the Assessing Officer to the effect that the claim of Rs.1,78,356/- amounts to penal in nature. For ready reference relevant part of the order is reproduced herein below.

**3.2. Grounds of appeal Nos. 2 & 3** relate to addition of Rs.1,78,356/-. *The AO has mentioned that it was noticed, the assessee claimed expenses of Rs.1,78,356/- on account of ESI damages. The assessee was asked to show cause why these may not be disallowed being penal in nature. In reply, the assessee submitted that a part of the amount was on account of interest payment where as the remaining part was of penal nature. The AO mentioned that even after allowing sufficient time the assessee could not file any document showing the amount of interest involved in this payment.*

*Therefore, whole of the amount was disallowed being penal in nature.*

*The facts of the case, the basis of addition made by the A.O. and the arguments of the AR during the appellate proceedings have been considered. During the appellate proceedings the AR repeated the argument that part of payment was compensatory in nature and was an allowable expenditure. However, it has not been shown even during the appellate proceedings as how much amount was penalty and what amount was compensatory interest. Under the facts and the circumstances of the case, the disallowance made by the AO is sustained as the assessee has himself accepted before the AO that a part of the amount was penal in nature but could not specify the same even during the appellate proceedings.*

*Accordingly, these grounds of appeal are dismissed.*

**4.** At the time of hearing, the Ld. AR filed many judgments and submitted that the assessee is unable to substantiate its claim due to its inability to produce the relevant documents to the effect that whether the payment under consideration was made qua damages, penalty or interest.

**5.** Having heard the rival submissions of the parties and perused the material on record. The only issue relates to the claim of Rs.1,78,356/- which has been claimed by the assessee on account of EST damages. This is admitted fact that the assessee has failed to bring any material on record as to whether the said amount was paid by way of damages or penalty or interest. Even the Assessing Officer also failed to give definite finding by any contrary material to the effect that the said amount was penal in nature. The Apex Court in the case of

Prakash Cotton Mills Pvt. Ltd. vs. CIT, dated on decision 6<sup>th</sup> April, 1993, in Civil Appeal No.1279 of 1977 [1993] 201 ITR 0684 held that:

*"The question whether any such impost is in essence compensatory or is by way of penalty will have to be decided having regard to the relevant provisions of the law under which it is imposed and the circumstances under which it has been imposed. The mere nomenclature as interest, penalty or damages in the Act may not be conclusive for the purpose of allowing it as a deduction under the IT Act. Similarly, the circumstance that a fixed rate of interest has to be paid also may not be conclusive. Sec. 14B of the Act provides for levy of damages for delayed payment as a percentage of the amount due up to a prescribed maximum. Such a determination is to be done by the appropriate authority after giving an opportunity to the employer. Thus, the levy will be by a speaking order of the authority fixing quantum of damages. As held by the Supreme Court, the said amount comprises both an element of penal levy as well as compensatory payment. It will be for the authority under the Income-tax Act to decide with reference to the provisions of the Employees' Provident Funds Act and the reasons given in the order imposing and quantifying the damages to determine what proportion should be treated as pena<sup>1</sup> and what proportion as compensatory. The entire sum can neither be considered as mere penalty nor as mere interest."*

Hence, considering the peculiar facts and circumstances of the case, we feel it appropriate to remand back this issue to the file of the Assessing Officer to determine the proportion of any, and where so, what proportion should be treated as penal and what proportion as compensatory, while considering the Employees State Insurance Act.

Hence, the order impugned herein is set aside and the case is remanded back to the file of the Assessing Officer to decide the issue under consideration in view of the observation made above.

**6.** In the result, the appeal filed by the assessee is allowed for statistical purposes.

*Order pronounced in the open Court on 05.07.2018.*

Sd/-  
(SANJAY ARORA)  
ACCOUNTANT MEMBER

Sd/-  
(N.K.CHOUDHRY)  
JUDICIAL MEMBER

Dated:05.07.2018

/PK/ Ps.

Copy of the order forwarded to:

- (1) M/s. Emm Kay Industries Limited, Jalandhar
- (2) The Asst. CIT, Jalandhar
- (3) The CIT(A)-5, Ludhiana
- (4) The CIT concerned
- (5) The SR DR, I.T.A.T., Amritsar

True copy

By order