

-आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ /

**IN THE INCOME TAX APPELLATE TRIBUNAL
SURAT- BENCH 'SURAT'**

**BEFORE SHRI RAJPAL YADAV, JUDICIAL MEMBER
AND
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER**

ITA No.2527 and 2528/Ahd/2015

निर्धारण वर्ष/Asstt. Year: 2006-07 and 2011-12

Shiva Industrial Security Agency Gujarat Pvt.Ltd. R.S. No.71, Sameer Complex Navsarjan Society Pandesara, Surat 394 221. PAN : AAFCS 3845 P	Vs.	ACITY, Cir.4 Surat.
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(Applicant)		(Respondent)
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Revenue by :	Smt.Smitha V. Nair, Sr.DR
Assessee by :	Shri Nirmal Somani, CA

सुनवाई की तारीख/Date of Hearing : 12/11/2018

घोषणा की तारीख/Date of Pronouncement: 13 /11/2018

आदेश/ORDER

PER RAJPAL YADAV, JUDICIAL MEMBER: Present two appeals are directed at the instance of the assessee against separate orders of the Id.CIT(A)-II, Surat dated 2.6.2015 for the Asstt.Year 2006-07 and 2011-12. Issues involved in both appeals are common, therefore, we heard both appeals together and deem it appropriate to dispose of them by this common order.

2. In the Asstt.Year 2006-07, the assessee has taken four grounds of appeal. Similarly, in the Asstt.Year 2011-12, it has taken five grounds of appeal, but grievance of the assessee revolves around two main issues viz. (a) the Id.CIT(A) has erred in upholding

disallowance of Rs.49,82,783/- and Rs.31,09,082/- made by the AO under section 36(1)(v) on account of deposits made by the assessee representing employees' contribution to PF account after due date in the Asstt.Years 2006-07 and 2011-12 respectively; (b) disallowance of Rs.2,09,885/- and Rs.3,08,247/- out of ESIC fund after specified due date in the Asstt.Year 2006-07 and 2011-12. Apart from these common issues, the assessee has challenged reopening of the assessment by issuance of notice under section 148 in the Asstt.Year 2006-07 and disallowance of Rs.1,49,180/- and Rs.1,46,667/- with the aid of section 40(a)(ia) of the Act in the Asstt.Year 2011-12.

3. Firstly, we take challenge made to reopening of assessment in the Asstt.Year 2006-07.

4. Brief facts of the case are that the assessee filed its return of income 31.12.2006 declaring total income at Rs.99,75,320/-. The assessment order was passed under section 143(3) of the Act on 26.12.2008 determining total income at Rs.1,0989,390/-. The Id.AO thereafter issued notice under section 148 of the Act on 20.3.2013. He has reopened the assessment. The reasons recorded by the AO for reopening of the assessment has been placed on page no.50 of the paper book, which reads as under:

**“REASON RECORDED FOR RE-OPENING THE ASSESSMENT
UNDER SECTION 147 OF THE I.T. ACT, 1961”**

On verification of the statements 2 and 3 to clause 16(b) of the Audit Report filed in Form No.3CD, it was noticed that the employees' contribution of P.F. amounting to Rs.1,07,37,371/- out of a total of Rs.1,24,10,261/- was not paid by the assessee company within the due date specified. Similarly, employees' contribution of E.S.I. amounting to Rs.2,32,098/- out of a total Rs.2,88,646/- was not paid by the assessee company to the relevant fund before the due date. Hence, the sum of Rs.

1,09,69,469/- requires to be added to the total income of the assessee u/s.36(l)(va) r.w.s 2(24)(x) the I.T. Act.

In view of the above, I have reason to believe that the income of the assessee company for A.Y. 2006-07 to the extent of Rs. 1,09,69,469/- has escaped assessment.

*Place : Surat
Date : 14.0.2013*

*(PIYUSHKUMAR SINGH YADAV)
Assistant Commissioner of Income Tax
Cir.4, Surat.*

5. The Id.counsel for the assessee, at the very outset submitted that assessment under section 143(3) was made on 26.12.2008. The AO could reopen the assessment on issuance of notice under section 148 in cases it is established that the assessee failed to disclose all material facts fully and truly. From perusal of the reasons recorded by the AO, it nowhere revealed that the AO has leveled any allegations against the assessee about non-disclosure of all material facts fully and truly. Therefore, reopening is not justified. On the other hand, the Id.DR relied upon the orders of the Revenue authorities below.

6. We have duly considered rival contentions and gone through the record carefully. It is an admitted position that notice under section 148 was issued after expiry of four years from the end of the assessment year. The assessment year involved in Asstt.Year 2006-07 and notice under section 148 was issued by the AO on 20.3.2012. Four years from the end of relevant assessment year is expired on 31.3.2011. It shows that notice has been issued after four years. Interdiction provided in proviso appended to section 147 puts an embargo on the powers of the AO to issue notice under section 148 after expiry of four years in cases where originally assessment was framed under section 143(3) of the Act. He can

issue such a notice only if it is established that the assessee failed to make a return under section 139 or in response to the notice issued under section 142(1) or section 148 or to disclose all material facts fully and truly necessary for its assessment. A perusal of the reasons extracted (supra), it nowhere reveals that the AO has pointed out any fact which was not disclosed by the assessee fully and truly. The facts recorded by him with regard non-payment of employees' contribution towards ESIC and PF are taken from the audit report. This audit report was already available with him. He has passed assessment order under section 143(3). Thus, the case of the assessee fully falls within the ambit of proviso appended to section 147 and conditions contemplated in the proviso were not fulfilled by the AO. Therefore, reopening is not justified. We quash the reassessment in the Asstt.Year 2006-07.

7. In the asstt.Year 2011-12, the first issue relates to disallowance of Rs.31,09,082/- and Rs.3,08,247/-. The brief facts of the case are that the assessee has filed its return of income electronically on 30.9.2011 declaring total loss at Rs.15,51,784/-. On scrutiny of the accounts, it revealed to the AO that the assessee failed to deposit employees contribution to EPF and ESCI amounting to Rs.31,09,082/- and Rs.3,08,247/-. These amounts are not being paid by the assessee within due date provided in these respective PF and ESCI Acts. Thus, the Id.AO disallowed the claim of the assessee. On appeal, the Id.CIT(A) has confirmed the disallowance by following judgment of jurisdictional High Court in the case of CIT Vs. Gujarat State Road Transportation Corporation, 265 CTR 64.

8. With the assistance of the Id.representatives, we have gone through the record carefully. The Id.counsel for the assessee

contended that Hon'ble Rajasthan High Court in the case of Pr.CIT Vs. Rajasthan State Beverages Corpn. Ltd., 84 taxmann.com 185 (SC) has allowed deduction of such payment, if the payments were made before the due date of filing of return. Department has filed SLP Hon'ble Supreme Court against judgment of Hon'ble Rajasthan High Court and the said SLP was dismissed. He placed on record copy of judgment of Hon'ble Rajasthan High Court, and copy of SLP dismissed by the Hon'ble Supreme Court reported in 84 taxmann.com 185. He also contended that ITAT, Cuttack Bench has considered both these issues, and thereafter allowed the deduction.

9. On the other hand, the Id.DR relied upon the orders of Revenue authorities.

10. We have duly considered rival contentions and gone through the record carefully. There are large number of decisions of different High Courts viz. Delhi, Bombay, Rajasthan, wherein it has been propounded that if employees contribution collected by the assessee and paid before the due date of filing of return, then deduction under section 43B would be allowed. In some of the cases, even SLP has been dismissed by the Hon'ble Supreme Court. But Hon'ble jurisdictional High Court has considered similar issue, and differed with other High Courts in the case of CIT Vs. Gujarat State Road Transport Corpn. Ltd. (supra). We do not find any merit in these two grounds of appeal in the Asstt.Year 2011-12. They are rejected and disallowance is confirmed.

11. In ground no.3 and 4, the assessee pleaded that the Id.CIT(A) has erred in upholding disallowance of interest expenses amounting

to Rs. Rs.1,49,180/-and Rs.1,46,667/- which was disallowed by the AO with the aid of section 40(a)(ia) of the Act.

12. It emerges out from the record that the assessee has made payment of interest to non-banking financial companies viz. Sundaram Finance and Shriram Finance. It failed to deduct TDS, hence interest expenditure claimed by it has been disallowed by the AO with the aid of section 40(a)(ia) of the Act. On this issue, we have heard both the parties.

13. We have duly considered rival contentions and gone through the record carefully. We find that the impugned additions have made with the aid of section 40(a)(ia) on account of non-deduction of TDS. Hon'ble Delhi High Court in the case of CIT Vs. Ansal Land Mark Township Ltd., 377 ITR 635 has observed that second proviso to sec 40(a)(ia) of the Income Tax Act, 1961 is to be read as applicable with retrospective effect. According to this proviso, if a payee has filed its return of income disclosing the payment received, then the assessee would not be considered in default. In the present case, it has been alleged against the assessee that it made payment of interests to various private financial institutions but the assessee failed to deduct TDS. As per the decision of the Hon'ble Delhi High Court cited supra, this aspect has to be verified. Therefore, respectfully following the judgment of Hon'ble Delhi High Court (supra), we are of the view that if recipients have included the amounts of taxes embedded in the payment made by the assessee in its return, then the assessee cannot be treated in default, and no disallowance under section 40(a)(ia) is to be made. Accordingly, we set aside this issue to the file of the AO for verification. The Id.AO shall call for details from parties mentioned

hereinabove, and verify whether they have accounted these interest receipts in their income tax returns or not. If they are accounted, then no disallowance shall be made. It is also observed that the assessee should also make effort for submitting these details of recipient companies. Accordingly, this ground of appeal is allowed for statistical purpose.

14. In the result, ITA No.2527/Ahd/2017 is allowed, and ITA No.2528/Ahd/20125 is partly allowed for statistical purpose.

Order pronounced in the Court on 13th November, 2018.

Sd/-
(AMARJIT SINGH)
ACCOUNTANT MEMBER
Surat; Dated 13/11/2018

Sd/-
(RAJPAL YADAV)
JUDICIAL MEMBER