

**IN THE INCOME TAX APPELLATE TRIBUNAL  
HYDERABAD BENCH 'B', HYDERABAD**

**BEFORE SMT. P. MADHAVI DEVI, JUDICIAL MEMBER  
AND SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER**

ITA No. 1108/Hyd/2017  
Assessment Year: 2009-10

Dy. Commissioner of Income-tax,  
Circle – 1(1), Hyderabad

vs. Andhra Prabha Publications  
Ltd., Hyderabad.

PAN – AAFCA 7213B

Appellant

Respondent

Revenue by: Smt. M. Narmada  
Assessee by: Shri S. Rama Rao

Date of hearing: 23/10/2018  
Date of pronouncement: 29/11/2018

**ORDER**

**PER S. RIFAUR RAHMAN, AM:**

This appeal is filed by the Revenue against the order of CIT(A) - 1, Hyderabad, dated 27/03/2017 for AY 2009-10.

2. Brief facts of the case are that the assessee, engaged in the business of printing and publication of newspapers and magazines, filed its return of income on 30/09/2009 declaring income of Rs. 71,82,352/-. The case was selected for scrutiny and order u/s 143(3) was passed on 31/10/2011 determining the assessed income at Rs. 82,74,231/-. The CIT-1, Hyderabad, powers vested u/s 263, set aside the assessment order vide his order dated 18/03/2014 stating that on verification of the assessment records, it was seen that the AO had failed to examine the following issues and completed the assessment:

1. Relevance of provisions of section 194H of the Act, on the amount of Rs. 1,51,55,998/- debited in the P&L

A/c towards sales discount and commission under the head 'selling and distribution' expenses.

ii. Requirement of disallowance of expenditure of Rs. 49,722/- debited to the P&L A/c towards interest on TDS.

iii. Requirement of disallowance u/s 36(1)(v)(a) for the delay in remittance of PF amount.

2.1 Accordingly, the AO passed the assessment order u/s 143(3) rws 263 determining the total income at Rs. 2,41,25,282/- by making the following disallowances:

1. Disallowance of Rs. 1,51,55,998/- towards incentives and commission paid to employees.

2. Disallowance of Rs. 6,45,331/- towards ESIC and PF contributions.

3. When the assessee preferred an appeal before the CIT(A), the CIT(A) deleted the aforesaid disallowances made by the AO.

4. Aggrieved by the order of CIT(A), the revenue is in appeal before us raising the following grounds of appeal:

*“(i) The Ld. CIT(Appeals) erred in deleting the addition of Rs 1,38,29,928/- (out of Rs 1,51,55,998/-) made by the Assessing Officer u/s 40(a)(ia) for non compliance with relevant TDS provisions and also on the ground that the genuineness of the expenditure was not proved by the assessee.*

*(ii) The Ld. CIT(A) ought to have considered that the said expenditure was shown as 'sales discount and commission' in the P & L A/c and not claimed as personnel cost in the P & L A/c as well as the return of account filed by the assessee for the year,*

*(iii) The Ld. CIT(A) ought to have upheld the action of the assessing officer as the assessee failed to deduct tax at source on the said sales discount and commission as required u/s 194H and therefore the expenditure is liable for disallowance u/s 40(a)(ia).*

*(iv) The Ld. CIT(A) erred in deleting the addition of Rs 3,02,361/- (out of Rs 6,45,331) made by the assessing*

*officer u/s 2(24)(x) r.w.s.36(1)(va) on account of belated payments of employees contribution to PF & ESI.*

*(v) The Ld. CIT(A) ought to have appreciated that the provisions of sec.43B are not applicable in case of employees' contribution to ESI & PF and the assessee would get deduction only if the payments are made before the due date as prescribed under the PF/ESI Act / rules or notification governing such funds.*

*(vi) The Ld.CIT(A), while allowing the claim of the assessee in case of belated employees contribution overlooked the clarification issued by the CBDT vide Circluar No 22/2015 dtd: 17-12-2015 that the provisions of sec 43B are attracted only in case of employer's contribution towards ESI & PF and not to contribution of employees to ESI &PF.*

*(vii) The appellant craves leave to add, delete, substitute and amend any ground of appeal before and/or at the time of hearing of the appeal.*

*For these and other grounds that may be urged before/at the time of hearing of the appeal, it is prayed that the addition of Rs. 1,38,29,928/- made on account of disallowance of commission and addition of Rs 3,02,361/- made u/s 2(24)(x) of IT Act on account of belated employees' contribution be restored.”*

5. As regards ground Nos. (i) to (iii) relating to disallowance of Rs. 1,51,55,998/- towards incentives and commission paid to employees, during the course of assessment proceedings, the AO issued notices u/s 143(2) and 142(1) calling for information regarding the claim of incentives and commission paid of Rs 1,51,55,998/-. Since, the assessee failed to appear for hearing and submit any information with regard to its claim, the AO held that in the absence of any explanation or documentary proof, the genuineness of the expenditure cannot be verified, and hence, disallowed the above claim of Rs. 1,51,55,998/-.

6. Before the CIT(A), the assessee submitted that Rs.1,51,55,998/- was paid to various persons is not

commission, but it was sales incentives only, which was paid to its own employees. The assessee submitted that employees are encouraged to solicit various parties / clients / agencies for procuring advertisements and subscription for the newspaper and the employees are rewarded by way of an incentive for the same in addition to their salary. It was submitted that the payments were not at all a commission as defined u/s.194H, but it was sales incentives paid to the employees of the company, paid in the form of commission coming under the purview of Section 17 of the IT Act. Relying on various case law, the assessee submitted that the commission and discounts do not come under the purview of the commission u/s 194H by any stretch of imagination and they are all sales incentives paid to employees and hence, TDS provisions will not apply to such sales incentives u/s 194H of the Act.

7. Since the evidence submitted before the CIT(A) was not submitted before the AO, the CIT(A) called for a remand report from AO regarding the additional evidences of statement of affidavits in respect of the employees for the FY 2008-09 and statement of incentives paid to employees for the FY 2008-09.

8. After considering the submissions of the assessee as well as remand report from the AO, the CIT(A) deleted the disallowance of Rs. 1,51,55,998/- made by the AO by observing as under:

*“6.4 The submissions of the appellant have been carefully considered. The appellant's contention has strength. The appellant submitted affidavits of the employees to substantiate the payments of incentives amounting to Rs.1,38,29,928/-. The appellant submitted details of the incentives paid to the employees which includes name of the employees, designation, address of the employees, sales incentives paid and salaries paid. The submissions given by the appellant are found*

*to be correct. The incentives paid to the employees are not subjected to TDS u/s.194H. There is no question of change of nomenclature. The incentives given to the employees by the appellant are found to be correct, hence the same is allowed. In respect of Advertisement contracts of Rs.13,26,070/- the Assessing Officer submitted in Remand Report that the TDS deducted was verified and the same is order. Hence, the same is allowed. The addition made by the Assessing Officer of Rs.1,51,55,998/- is deleted.*

9. Considered the rival submissions and perused the material on record. The CIT(A) gave a categorical finding that the incentives paid to the employees are not subjected to TDS u/s.194H and there is no question of change of nomenclature and the incentives given to the employees by the assessee are found to be correct, hence the same is allowed. It is brought to our notice the detailed statement on incentive distribution among its employees. The total payment including salaries are below the threshold limits. Ld. CIT(A) has called for remand report from AO and AO has not disputed the actual expenditure but expressed his views that the assessee has changed the nomenclature of the expenses to incentives. After considering the relevant papers submitted before him and remand report, Id. CIT(A) has allowed the assessee's appeal. Therefore, we do not find any infirmity in the order of CIT(A) and hence, upholding the same, we dismiss the grounds raised by the revenue on this issue.

10. With regard to ground Nos. (iv) to (vii) relating to disallowance towards ESIC and PF contributions, the AO observed that since the assessee failed to substantiate its claim before him, made disallowance u/s 36(v)(a) of Rs. 6,45,331/- for non payment of ESIC and PF before the due date.

11. The CIT(A) observed that the ESIC and PF payments were made before the filing of return of income and following the decision of the coordinate bench of this Tribunal in the case of M/s Tetra Soft (India) Pvt. Ltd. in ITA No. 218 & 219/Hyd/2015, dated 03/06/2015, deleted the disallowance mad by the AO on the ground that though the assessee remitted the contributions towards ESIC and PF beyond the due, but, paid before filing of the return of income.

12. Considered the rival submissions and perused the material on record. It is a settled position of law that though the assessee paid the contributions towards ESIC and PF beyond the due date, but, before filing of the return of income, no disallowance can be made in this regard. The Hon'ble Delhi High Court in *CIT VS. Aimil Ltd. & Ors. [(2010) 321 ITR 508 (Del)]* has held that if the employees' share of contribution is paid before the due date of filing the return u/s 139(1) of the Income-tax Act, 1961 then no disallowance can be made. Accordingly, we uphold the order of CIT(A) on this count and dismiss the grounds raised by the revenue.

13. In the result, appeal of the revenue is dismissed.

Pronounced in the open court on 29<sup>th</sup> November, 2018.

Sd/-  
(P. MADHAVI DEVI)  
JUDICIAL MEMBER

Sd/-  
(S. RIFAUR RAHMAN)  
ACCOUNTANT MEMBER

Hyderabad, dated 29<sup>th</sup> November, 2018

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Copy forwarded to:

1. *DCIT, Circle – 1(1), Room No. 836, 7<sup>th</sup> Floor, 8<sup>th</sup> floor, C – Block, IT Towers, AC Guards, Masab Tank, Hyd.*
2. *M/s Andhra Prabha Publications Ld., D.No. 8-2-293/82/A/75, Plot No. 75, Road No. 9, Jubilee Hills, Hyd – 500 033*
3. *CIT(A) - 1, Hyderabad*
4. *Pr. CIT - 1, Hyderabad*
5. *The DR, ITAT, Hyderabad*
6. *Guard File*