

आयकर अपीलीय अधिकरण , ' डी ' न्यायपीठ, चेन्नई  
**IN THE INCOME TAX APPELLATE TRIBUNAL  
"D" BENCH, CHENNAI**

श्री जॉर्ज माथन, न्यायिक सदस्य एवं श्री एस जयरामन, लेखा सदस्य केसमक्ष

**BEFORE SHRI GEORGE MATHAN, JUDICIAL MEMBER  
AND SHRI S. JAYARAMAN, ACCOUNTANT MEMBER**

**आयकर अपील सं./I.T.A. Nos. 650 & 651/Chny/2018**

**निर्धारण वर्ष/Assessment Years : 2013-14 & 2014-15**

Deputy Commissioner of Income  
Tax,  
Central Circle – 1(1),  
Chennai .

M/s. Orchid Pharma Ltd.,  
Vs. (Formerly known as M/s. Orchid  
Chemicals & Pharmaceuticals Ltd.,)  
313, Orchid Towers,  
Valluvar Kottam High Road,  
Nungambakkam,  
Chennai – 600 034.

**[PAN: AAACO 0402B]**

**(अपीलार्थी/Appellant)**

**(प्रत्यर्थी/Respondent)**

Revenue by

: Shri. M. Srinivasa Rao, CIT

Assessee by

: None

सुनवाईकीतारीख/Date of Hearing

: 13.12.2018

घोषणाकीतारीख/Date of Pronouncement

: 13.12.2018

**आदेश/ ORDER**

**PER S. JAYARAMAN, ACCOUNTANT MEMBER :**

The Revenue filed these appeals against the orders of the Commissioner of Income Tax (Appeals)-3, Chennai in ITA Nos. 36 & 235/16-17/A-3 dated 31.11.2017 for assessment year 2013-14 & 2014-15, respectively.

2. M/s. Orchid Pharma Ltd., the assessee, is a manufacturer of drugs and fertilizer products. While making the assessment for assessment year 2013-14, the Assessing Officer noticed, inter alia, that the assessee has not paid employees contribution to PF & ESI within the due dates as specified in the relevant Acts, although, the assessee has remitted them before the due date for filing the return under the Income Tax Act. Further, in the assessment made for assessment year 2014-15, the AO made disallowance u/s. 14A r.w.r. 8D. Aggrieved against those orders, the assessee filed appeals before the CIT(A). On the issue of disallowance made u/s. 36(1)(va), the CIT(A) allowed the assessee's appeal relying on the following decisions

- i. Delhi High Court in AIMIL Ltd (2010) (321 ITR 508) (Delhi)
- ii. Rajasthan High Court in State Bank of Bikaner and Jaipur (2014) (265 CTR 471) (Rajasthan)
- iii. Uttarakand High Court in Kichha Sugar Co. Ltd (2013) (356 ITR 327)
- iv. Himachal Pradesh High Court in Nipso Polyfabriks Ltd (2013) (350 ITR 327)
- v. Bombay High Court in Ghatge Patil Transports (2014) (368 ITR 749) (Bombay)

With regard to the disallowance made u/s. 14A, relying on this tribunal decision in the case of ACIT vs M. Baskaran ITA No. 1717/Mds/2013 for assessment year 2009-10, the CIT(A) deleted the addition. Aggrieved, the Revenue filed these appeals.

3. The Revenue filed both the appeals with a delay of one day. We have considered the Revenue's affidavit, heard the parties and condone the delay.

4. The Revenue's grounds in respect of the issue u/s. 36(1)(va) r.w.s. 2(24)(x) are as under:

*"1. The order of the learned Commissioner of Income Tax (Appeals) is erroneous on facts of the case and in law.*

*2. The Id. CIT(A) erred in deleting the disallowance of Rs. 17,12,37,289/- made u/s 36(1)(va) of the Income Tax Act, 1961, by the Assessing Officer (AO) towards belated payment of employee's contribution to Provident Fund(PF) of Rs15,79,41,125/- and Employee State Insurance (ESI) of Rs. 1,32,96,164/- in the assessment order passed u/s 143(3) of the IT Act, 1961, for AY 2013-14 in the assessee's case,*

*2.1 The Id.CIT(A) is not justified in deleting the disallowance made u/s 36(1)(va) relying on decisions of various Hon'ble High Courts, which held that all contributions to ESI/PF made within the due date u/s 139(1) of the IT Act is deductible u/s 438(b) of the IT Act, when the deduction on account of remittance of employee's contribution to welfare funds is governed by section 36(1)(va) r.w.s 2(24)(x) of the IT Act, wherein it is categorically stated that the employee's contribution should be paid into their account within the due date allowed in the respective Acts viz,, ESI Act and PF Act.*

*2.2 The Id.CIT(A) ought to have appreciated that the opening words of section 438 of the IT Act make it clear that the provisions of the said section would apply only when a deduction is otherwise allowable under the Income Tax Act and thus the provisions of section 438 of the IT Act cannot be pressed into service to allow a deduction which is otherwise not allowable under the Income Tax Act including section 36(1)(va) thereof.*

2.3 The Id.CIT(A) ought to have appreciated that provisions of Sec.43B(b) of the IT Act deal with allowability of employer's contribution to Provident Fund or any other funds for the welfare of employees, whereas the employee's contribution to the said funds is not an expenditure incurred by the assessee but an amount collected by the assessee, as an employer, from the employees' salary to be credited to the employees' account in the relevant funds and as such, the employee's contribution to PF/ESI funds, partakes the character of income of the assessee employer as per the provisions of section 2(24)(ix) of the IT Act, 1961.

2.4 The Id.CIT(A) ought to have appreciated that the employee's contribution to PF/ESI funds, deemed as income of the assessee employer u/s 2(24)(x) of the IT Act, becomes eligible for deduction u/s 36(1)(va) of the IT Act, only when it is deposited within the date by which the assessee as an employer, is required to credit the respective employees' account in the relevant funds under the PF Act and ESI Act, independent of and de hors section 438 of the IT Act.

2.5 The Id.CIT(A) ought to have appreciated that in the present case, the employee's contribution of Rs.15,79,41,125/- towards Provident Fund (PF) and Rs.1,32,96,164/- towards Employee State Insurance (ESI) were not credited by the assessee, as an employer, to the respective employee's account in the relevant funds on or before the due date under the PF Act and ESI Act as required in the Explanation to section 36(1)(va) of the IT Act, as is evidenced from the form 3CD filed along with the return of income furnished by the assessee for the A.Y 20 13-14.

2.6 The Id.CIT(A) ought to have appreciated the clarification given by the Central Board of Direct Taxes vide Circular No. 22 of 2015 dated 17, 12.2015, wherein it was clarified that the deductions relating to employees' contribution to welfare funds are governed by section 36(1)(va) of the IT Act.

2.7 The ICLCIT(A) ought to have taken cognizance to the decision of the Hon'ble Gujarat High Court in the case of CIT Vs MIs Gujarat State Road Transport Corporation Ltd4366 IT! 170), decision of

*Hon'ble Jurisdictional High Court in the case of CIT Vs MIs Madras Radiators Pressing Ltd. (264 IT! 620), the decision of Hon'ble Kerala High Court in the case of CIT, Cochin Vs M/s Mercham Ltd. reported in (2015) 378 IT! 443 and the decisions of the Hon'ble ITAT, Mumbai in the case of MIs LKP Securities Ltd [ITA 638/Mum/2012 dated 17.05.2013 wherein it was held that the employees's contribution should be paid within the due date as provided in the related statutes to be allowed as deduction u/s 36(1)(va) of the IT Act.*

*2.8 The Id.CIT(A) ought to have appreciated that the decision of the Hon'ble Supreme Court in the case of Mis Rajasthan State Beverages Corporation Ltd.12017} 84 taxmann.com 185 is only a dismissal in-limine, without discussion on merits of the case, of the SIAP filed by the revenue against the order of the Hon'ble Rajasthan High Court and as such cannot be taken as law settling the issue.*

*2.9 Having regard to the submissions in the foregoing grounds, the Id.CIT(A) ought to have appreciated that the decisions relied on by him to allow relief to the assessee are distinguishable to the facts of the present case and as such, ought to have upheld the action of the AO in denying deduction of belated remittance of employee's contribution to ES! & PF funds and deeming the same as income of the assessee as provided in section 2(24)(c) r.w.s. 36(lj(va) of thQ IT Act in the assessment order passed u/s 143(3) of the IT Act, 1961, for AY 2013-14 in the assessee's case.*

*3. For these grounds and any other ground including amendment of grounds that may be raised during the course of the appeal proceedings, the order of learned CIT(Appeals) may be set aside and that of the Assessing Officer be restored."*

The Ld. DR very elaborately argued on the lines of the grounds of the appeal. None was present for the assessee.

5. We heard the Ld. DR and gone through the relevant material. The fact remains that the assessee has paid the employee's contribution to PF & ESI within the due date permitted under Income Tax Act before filing the return, although, it has not paid them within the due dates permitted under the respective Act. In this regard, the jurisdictional High Court decision in the case of CIT vs Industrial Security & Intelligence Pvt Ltd., in TCA No 585 & 586 of 2015 dated 24.07.2015 is extracted as under:

*"5. We find that the Tribunal has rightly relied on the decision of the Supreme Court in the case of CIT Vs Alum Extrusions Ltd. reported in 319 HR 306, whereby, the Supreme Court held that omission of second proviso to section 43B and amendment to first proviso by Finance Act, 2003 are curative in nature and are effective retrospectively i.e with effect from 1.4. 1 988 i.e. the date of insert fort of first proviso. The Delhi High Court in the case of CIT V Amil Ltd. reported in 321 ITR 508 held that if the assessee had deposited employee's contribution towards Provident Fund and ESI after due dates as prescribed under the relevant Act, but before the due date of filing of return under the Income Tax Act, no disallowance could be made in view of the provisions of section 43.B as amended by Finance Act, 2003.*

*6. In the present case, the assessee had remitted the employees contribution beyond the due date for payment, but within the due date for filing the return of income. Hence, following the above said decision, we find no reason, to differ with the findings of the Tribunal. Accordingly, we find no question of law much less any substantial question of law arises for consideration in these appeals. Accordingly, both the Tax case (Appeals) stand dismissed. No costs. Consequently, M.P.No.1 of2015 is also dismissed."*

Accordingly, we do not find any reason to interfere with the order of the CIT(A). The Revenue's appeal for assessment year 2013-14 is dismissed.

6. With regard to the disallowance made u/s. 14A, for assessment year 2014-15, the Revenue's grounds of appeal are extracted as under:

*"1. The order of the learned Commissioner of Income Tax (Appeals) is erroneous on facts of the case and in law.*

*2. The Ld. CIT(A) erred in deleting the disallowance of Rs. 11,92,11,436/- made by the Assessing Officer (AO) u/s 14A of the Income Tax Act, 1961, read with Rule 8D of the Income Tax Rules, 1962, in the assessment order for AY 2014-15 passed u/s 143(3) of the IT Act, 1961, in the assessee's case.*

*2.1 The Ld. CIT(A) having deleted the disallowance u/s 14A of the IT Act on the ground that the assessee has not earned /received any dividend income nor claimed the same p the Return of Income, ought to have appreciated the CBDT circular No.5/2014 dated 11/02/2014 stating that Rule 8D r.w.s 14A of the IT Act provides for disallowance of the expenditure, even where the taxpayer, in a particular year, has not earned any exempt income.*

*2.2 The Ld. CIT(A) ought to have appreciated that in the present case, the assessee has declared dividend income of Rs.1,09,943/- and that having accepted the applicability of sec. 14A of the IT Act, the assessee has disallowed on its own and added Rs.95,079/- to the total income in this regard, in the computation of Total income filed along with the return of income furnished for A.Y 2014-15.*

*2.3 The Ld. CIT(A) ought to have appreciated that in the present case, the AO has recorded his satisfaction in the assessment order, as required in section 14A (2) of the IT Act and that after discussing the said provisions, the AO went on to make disallowance u/s 14A of the IT Act as per Rule 8D of the IT Rules, 1962.*

*2.4 Having relied on the decision of the Hon'ble ITAT, Chennai in the case of ACIT Vs M. Bhaskaran in ITA No.1717/Mds/2013 dated 31.07.2014 to delete the disallowance made u/s 14A of the IT Act in the assessee's case, the Ld. CIT(A) ought to have appreciated that the said decision was not contested by the revenue only because the tax effect involved was below the monetary limits prescribed by CBDT.*

*2.5 The Ld. CIT(A) ought to have appreciated that the AO has rightly computed the disallowance u/s 14A of the IT Act as provided in Rule 8D of the IT Rule 1962, and as such ought to have confirmed the disallowance made by the AO in the assessment for 2014-15 in the case of the assessee.*

*3. For these grounds and any other ground including amendment of grounds that may be raised during the course of the appeal proceedings, the order of learned CIT (Appeals) may be set aside and that of the Assessing Officer be restored."*

The Ld. DR argued on the lines of the grounds of the appeal. None was present for the assessee.

7. We heard the Ld. DR and gone through the relevant material. In the assessment order, the AO has not specified as to whether the assessee has earned any exempt income or not. He has also not mentioned whether the assessee has made any disallowance on its own towards earning of exempt income. However, the Revenue has taken ground no 2.2 which is extracted as under:

*"2.2 The Ld. CIT(A) ought to have appreciated that in the present case, the assessee has declared dividend income of Rs.1,09,943/- and that having accepted the applicability of sec. 14A of the IT Act, the assessee has disallowed on its own and added Rs.95,079/- to*

*the total income in this regard, in the computation of Total income filed along with the return of income furnished for A.Y 2014-15."*

In view of that, since the facts and circumstances associated with the issue is not on record, this issue is remitted back to the AO for a fresh examination. The Assessing Officer shall decide the issue after affording adequate opportunity to the assessee, in accordance with law.

8. In the result, the Revenue's appeal in ITA No. 650/Chny/2018 for assessment year 2013-14 is dismissed and its appeal in ITA No. 651/Chny/2018 for assessment year 2014-15 is treated as allowed for statistical purposes.

Order pronounced in the open court on 13<sup>th</sup> December, 2018 at Chennai.

**Sd/-**  
**(जॉर्जमाथन)**  
**(GEORGE MATHAN)**  
**न्यायिकसदस्य/Judicial Member**

**Sd/-**  
**(एसजयरामन)**  
**(S. JAYARAMAN)**  
**लेखासदस्य/Accountant Member**

चेन्नई/Chennai,

दिनांक/Dated: 13<sup>th</sup> December, 2018

**JPV**

आदेशकीप्रतिलिपिअग्रेषित/Copy to:

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकरआयुक्त) अपील(/CIT(A)
4. आयकरआयुक्त/CIT
5. विभागीयप्रतिनिधि/DR
6. गार्डफाईल/GF