

आयकर अपीलिय अधिकरण "ए" न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, PUNE

श्री डी. करुणाकरा राव, लेखा सदस्य, एवं श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष ।
BEFORE SHRI D. KARUNAKARA RAO, AM AND SHRI VIKAS AWASTHY, JM

आयकर अपील सं. / ITA No.686/PUN/2017

निर्धारण वर्ष / Assessment Year : 2013-14

Devi Construction Co. Pvt. Ltd.,
1161/10, Devi Niwas,
Shivaji Nagar, Pune – 411005

PAN : AAACD6005B

.....अपीलार्थी / Appellant

बनाम / V/s.

The Income Tax Officer,
Ward – 1(3), Pune

.....प्रत्यर्थी / Respondent

Assessee by : Shri Kishor Phadke
Revenue by : Ms. Shabana Parveen

सुनवाई की तारीख / Date of Hearing : 12-06-2019
घोषणा की तारीख / Date of Pronouncement : 02-07-2019

आदेश / ORDER

PER VIKAS AWASTHY, JM :

This appeal by the assessee is directed against the order of Commissioner of Income Tax (Appeals)-1, Pune dated 30-01-2017 for the assessment year 2013-14.

2. The assessee has assailed the order of First Appellate Authority by raising following grounds of appeal :

- “1. The learned CIT(A)-1, Pune erred in law and on facts, in disallowing the payment of Rs.5,85,971/- for Employees' State Insurance Corporation (ESIC) and Rs.11,81,255 for Employees Provident Fund (EPF) u/s 37(1) of the Income tax Act, 1961, voluntarily paid on behalf of the sub-contractors employing labourers at the appellants project site. While arriving at the conclusion learned CIT(A)-1, Pune ought to have appreciated that, in absence of such voluntary compliances under respective ESIC and PF act, ultimate cascading liability is on the Appellant.
2. Alternate and without prejudice to the Ground no 1 above, learned CIT(A)-1, erred in law and on facts in not appreciating that the said expenses is incurred on account of commercial expediency and hence should be allowed u/s 37 of ITA 1961.
3. The learned CIT(A)-1, Pune erred in law and on facts, in partially sustaining the disallowance of expenses u/s 14A of the ITA, 1961 made by the learned ITO, Ward 1(3), Pune. The learned CIT(A)-1, Pune ought not to have sustained disallowance of Rs.3,90,531/- made under rule 8D(iii) of the ITA, 1961, considering the facts of the case and various legal propositions.
4. The appellant craves, leave to add / modify / delete all or any of the grounds of appeal.”

3. Shri Kishor Phadke appearing on behalf of the assessee submitted that the assessee is a Private Limited Company and is engaged in the business of Civil Engineering and Industrial Construction. The assessee had hired the services of sub-contractors to execute job work. The sub-contractors did not comply with the statutory provisions of Employees Provident Fund (EPF) and Employees State Insurance Corporation (ESIC). The assessee discharged the liability and paid EPF and ESIC aggregating to Rs.17,67,226/- in respect of contract labourers not on the rolls of the assessee. The ld. AR submitted that these were the statutory compliances made by the assessee on behalf of the sub-contractors. However, such

payments were not deducted by the assessee from payments made to the sub-contractors. The Assessing Officer disallowed aforementioned payments on the premise that these are not contractual obligations of the assessee. The ld. AR submitted that the Assessing Officer has not disputed the payments made for EPF and ESIC in respect of contract labours. It is a business expenditure and was incurred on account of commercial expediency and hence allowable under the provisions of section 37 of the Act. The ld. AR in support of his contentions placed reliance on the decision of Pune Bench of Tribunal in the case of Ratilal Bhagwandas Construction Co. (P.) Ltd. Vs. Income Tax Officer reported as 82 taxmann.com 292.

3.1 In respect of ground No. 3 of the appeal, the ld. AR submitted that the assessee has assailed disallowance u/s. 14A r.w. Rule 8D(iii) Rs.3,90,531/- sustained by the First Appellate Authority. The ld. AR submitted that the Assessing Officer had made disallowance of Rs.13,22,343/- u/s. 14A r.w. Rule 8D. In First Appellate proceedings the Commissioner of Income Tax (Appeals) granted partial relief to the assessee by deleting disallowance made under Rule 8D(ii) and confirmed the disallowance under Rule 8D(iii). The Commissioner of Income Tax (Appeals) ought to have deleted entire disallowance made u/s. 14A r.w. Rule 8D.

4. On the other hand Ms. Shabana Parveen representing the Department vehemently defended the impugned order. The ld. DR submitted that the assessee was not under obligation to discharge the

liability under EPF and ESIC in respect of employees of sub-contractors. If at all the assessee had made the payments on behalf of sub-contractors, the assessee should have deducted the same from the payments made to the sub-contractors.

5. Both sides heard. Orders of the authorities below perused. In ground Nos. 1 and 2 of the appeal the assessee has assailed disallowance of payments made by the assessee under EPF and ESIC in respect of the employees of sub-contractors. The assessee had claimed expenditure in respect of aforesaid payments u/s. 37(1) of the Act. The ESIC payments made by the assessee and the payments made for EPF in respect of contract labours aggregating to Rs.17,67,226/- are not disputed by the Department. The only reason for disallowing the payments is that the assessee was not under contractual obligation to make such payments as the payments were in respect of labourers of sub-contractors who were not on the rolls of the assessee. The ld. AR has brought our attention to the decision of Co-ordinate Bench of Tribunal in the case of Ratilal Bhagwandas Construction Co. (P.) Ltd. Vs. Income Tax Officer (supra). In the said case under somewhat similar circumstances payments were made under Employees Provident Fund Act, 1952 in respect of sub-contract labourers. The Co-ordinate Bench after examining the facts of the case and provisions of Employees Provident Fund Act, 1952 allowed assessee's claim therein by observing as under :

“10. The perusal of the aforesaid sections of the Employees Provident Fund & Miscellaneous Provisions Act 1952 and Employees Provident Fund Scheme 1952 together with the clauses of the agreement that the Assessee had entered into with his clients shows that Assessee is responsible for the deduction of provident fund dues of the employees including those employed through subcontractor and its deposit with the appropriate authorities. In the

present case, the rendering of services by the labours of sub-contractors for the purpose of business of the Assessee has not been doubted by Revenue. Further, statutorily the Assessee could have recovered the Provident Fund dues from the subcontractors but when the Assessee is not in a position to recover the amounts paid as provident fund contribution for the respective contract labourers, or considering the business exigencies when the Assessee bears the expenses on account of Provident Fund contribution, then whether in such a situation the expenses can be disallowed? We are of the view that the same cannot be disallowed as an expenditure more so when the rendering of services by the subcontractors for the business of the assessee is not in doubt & in such a situation the expenditure can be allowed u/s 37(1) of the Act.

11. For an amount to be treated as an admissible expenditure under section 37(1) the necessary conditions that are required to be satisfied are first the expenditure must be revenue expenditure and not in the nature of capital expenditure; second, it must be laid out or expended wholly and exclusively for the purpose of the business or profession carried on by the assessee; third, it must not be of the nature described in Sections 30 to 36; fourth, expenditure should not be personal expenditure of the assessee; fifth, expenditure should have been incurred in the previous year; and finally, expenditure should not have been incurred for the purpose which is an offence or which is prohibited by law (Explanation to Section 37 (1)).

12. Section 37(1) does not curtail or prevent an assessee from incurring an expenditure which he feels and wants to incur for the purpose of business. Expenditure incurred may be direct or may even indirectly benefit the business in form of increased turnover, better profit, growth etc. Various courts have held that when as long as the expenditure incurred is "wholly and exclusively" for the purpose of business, the Assessing Officer cannot by applying of his own mind, disallow whole or a part of the expenditure. The Assessing Officer cannot question the reasonableness by putting himself in the arm-chair of the businessman and assume status or character of the assessee and that it is for the assessee to decide whether the expenses should be incurred in the course of his business or profession or not. Courts have also held that if the expenditure is incurred for the purposes of the business, incidental benefit to some other person would not take the expenditure outside the scope of Section 37(1) of the Act. Further, it is settled law that the commercial expediency of a businessman's decision to incur a particular expenditure cannot be tested on the touchstone of strict legal liability to incur such expenditure.

13. Considering the totality of the aforesaid facts, we are of the view that in the present case, the disallowance of employees contribution of Provident Fund (as made by AO) & that of employers contribution of Provident Fund (as enhanced by CIT (A)) was uncalled for and therefore set aside. Thus the grounds of Assessee are allowed."

6. In the instant case though the assessee was not under contractual obligation but the assessee was severally liable for the compliances of the provisions of Employees Provident Fund and Miscellaneous Provisions Act, 1952 and the scheme framed under the said Act. Further, the assessee as part of good corporate governance complied with the provisions of beneficial legislature qua the contract labourers who were working for the assessee. The rendering of service and payments have not been doubted by the Department. The payments were wholly and exclusively for the purpose of business of assessee. Thus, in view of the facts of the case and the decision of Co-ordinate Bench, we are of considered view that the assessee's claim of such payments u/s. 37(1) of the Act deserves to be allowed. We accept assessee's alternate contention raised in ground No. 2 of the appeal. Accordingly, ground No. 1 of the appeal is dismissed and the ground No. 2 of the appeal is allowed.

7. In ground No. 3 of the appeal, the assessee has assailed disallowance of expenditure u/s. 14A r.w. Rule 8D(iii) amounting to Rs.3,90,531/-. A perusal of impugned order shows that the Assessing Officer had made disallowance of Rs.13,22,343/- u/s. 14A r.w. Rule 8D(ii) and (iii). In First Appellate proceedings the Commissioner of Income Tax (Appeals) deleted disallowance of Rs.9,31,812/- in respect of interest expenditure, i.e. disallowance made under Rule 8D(ii). The Commissioner of Income Tax (Appeals) sustained statutory disallowance of 0.5% of the average value of investments under Clause (iii) of Rule 8D. We observe that the findings of Commissioner of Income Tax (Appeals) on this issue

are fair and reasonable, hence, we do not find any reason to interfere with the same. Accordingly, ground No. 3 of the appeal is dismissed.

8. The ground No. 4 of the appeal is general in nature, hence, requires no adjudication.

9. In the result, the appeal of assessee is partly allowed in the terms aforesaid.

Order pronounced on Tuesday, the 02nd day of July, 2019.

Sd/-	Sd/-
(डी. करुणाकरा राव/D. Karunakara Rao)	(विकास अवस्थी / Vikas Awasthy)
लेखा सदस्य / ACCOUNTANT MEMBER	न्यायिक सदस्य / JUDICIAL MEMBER

पुणे / Pune; दिनांक / Dated : 02nd July, 2019

RK

आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त (अपील) / The CIT(A)-1, Pune
4. The Pr. Commissioner of Income Tax-1, Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "ए" बेंच,
पुणे / DR, ITAT, "A" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

//सत्यापित प्रति // True Copy//

आदेशानुसार / BY ORDER,

निजी सचिव / Private Secretary,
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune