

आयकर अपीलीय अधिकरण न्यायपीठ, नागपुर में ।
IN THE INCOME TAX APPELLATE TRIBUNAL BENCH, NAGPUR

(At e-Court, PUNE)

BEFORE SHRI D. KARUNAKARA RAO, AM AND
SHRI PARTHA SARATHI CHAUDHURY, JM

आयकर अपील सं. / ITA No.187/NAG/2015

निर्धारण वर्ष / Assessment Year : 2011-12

The Income Tax Officer,
Ward-3(4), Nagpur.

.....अपीलार्थी / Appellant

बनाम / V/s.

M/s. Deepak Construction
New Bhanegaon,
Khaparkheda, Saoner,
Nagpur- 441102.
PAN: AADFD4092L

.....प्रत्यर्थी / Respondent

Assessee by : None

Revenue by : Shri U.U. Kesar

सुनवाई की तारीख / Date of Hearing : 16.01.2020

घोषणा की तारीख / Date of Pronouncement : 16.01.2020

आदेश / ORDER

PER PARTHA SARATHI CHAUDHURY, JM :

This appeal preferred by the Revenue emanates from the order of the
Ld. CIT(Appeals)-II, Nagpur dated 02.03.2015 for the assessment year 2011-
12 as per the following grounds of appeal on record:

“1. On the facts and the circumstances of the case and in law, the ld. CIT(A) erred in deleting the addition of Rs.1,98,02,298/- made by the Assessing Officer under section 40(a)(ia) of the Income Tax Act, 1961.

1(a). On the facts and circumstances of the case and in law, the ld. CIT(A) erred in not appreciating the facts that the Special Leave Petition filed by the Department against the ruling in the case of CIT vs Vector Shipping Services Pvt. Ltd. (262 CTR 545) was dismissed in limine without a speaking order and without considering detailed Circular No. 10/DV/2013 dated 15.12.2013 on the issue and later judgment like CIT vs Crescent Export Syndicate [2013] 216 Taxman 258 (Cal) and CIT Vs. Sikandarkhan N. Tunwar [2013] 357 ITR 312 (Guj) which have taken a view contrary to that of the Allahabad High Court in CIT Vs. Vector Shipping Services Pvt. Ltd. (262 CTR 545) on the issue.

2. On the facts and circumstances of the case and in law, the ld. CIT(A) erred in granting relief of Rs.1,24,444/- to the assessee in respect of delayed deposit of the employees' contribution into the Employees Provident Fund without appreciating that the due date of the employees' contribution to the provident fund is governed by section 36(1)(va) and not section 43B of the Income Tax Act, 1961.

2(a). On the facts and circumstances of the case and law, the ld. CIT(A) erred in not appreciating the fact that the Hon'ble Supreme Court in the case of CIT Vs Alom Extrusions Ltd (319 ITR 306) (2009) dealt with the second proviso to section 43B and not with the provisions of section 36(1)(va) of the Income Tax Act.

*2(b) On the facts and circumstances of the case and in law, the ld CIT(A) also failed to take cognizance of the ITAT (Mumbai's) later ruling in the case of ITO vs LKP Securities (ITA No.638/Mum/2012) wherein it has been held that section 43B covers only the sums payable by way of contribution by the assessee as an employer and that it does not cover the employees' contribution which is allowable as a deduction u/s 36 (1)(va) only if it is paid to the relevant fund by the **due date** as prescribed in the relevant legislation.*

3. Any other ground of appeal that may be raised from time to time during the course of appellate proceedings.”

2. At the time of hearing through video conference, neither the assessee nor his Authorized Representative was present. The records were checked and it was found that notice of hearing has been duly issued and served on the assessee. In spite of the facts, the assessee is absent on this date of hearing. Neither any adjournment petition was filed on behalf of the assessee. Taking into account evasive and careless attitude of the assessee, we proceed to hear Revenue's appeal on merits by recording submissions of the Ld. DR on record.

3. With regard to **Ground No.1**, contentions of the Ld. DR is that the Ld. CIT(Appeals) while providing relief to the assessee has relied on the decision in the case of **CIT Vs. Vector Shipping Services Pvt. Ltd., 262 CTR 545**. Thereafter, there is a decision of the Hon'ble Supreme Court in the case of **Palam Gas Service Vs. Commissioner of Income Tax (2017) 81 taxmann.com43 (SC) dated May 3, 2017**, which is the current position of law on the issue as held by the Hon'ble Supreme Court. The Ld. DR further contended that this issue may be restored back to the file of the Ld. CIT(Appeals) to reconsider his decision in respect of the present legal developments i.e. in reference to the judgment of the Hon'ble Supreme Court in the case of Palam Gas Service Vs. Commissioner of Income Tax (supra.) and then adjudicate this matter.

4. We have perused the case records and given considerable thought to the findings of the Ld. CIT(Appeals) on the issue. We find the Ld. CIT(Appeals) has relied on the decision of CIT Vs. Vector Shipping Services Pvt. Ltd (supra.). Thereafter, the Hon'ble Supreme Court has given judgment in the case of Palam Gas Service Vs. Commissioner of Income Tax (supra.) reversing the decision in the case of CIT Vs. Vector Shipping Services Pvt. Ltd (supra.) wherein the head note reads as follows:

“Whether word ‘payable’ occurring in section 40(a)(ia) not only covers cases where amount is yet to be paid but also those cases where amount has actually been paid- Held- yes (para 15) [in favour of revenue.”

We are of the considered view therefore, in the interest of justice, the order of the Ld. CIT(Appeals) should be set aside and matter may be restored back to his file to reconsider his decision in the light of the present legal developments specially in the case of Palam Gas Service Vs. Commissioner of

Income Tax (supra.). We order accordingly. Thus, **Ground No.1 raised in appeal by the Revenue is allowed for statistical purposes.**

5. **Ground No.2** pertains to the fact that “*whether the Ld. CIT(Appeals) was justified in granting relief of Rs.1,24,444/- to the assessee in respect of delayed deposit of the employees’ contribution into the Employees Provident Fund.*”

6. Before the Ld.CIT(Appeals), the assessee has made elaborate submissions which is as follows :

“That your honour in this case Assessing Officer had disallowed EPF of Rs.1,24,444/-by invoking provisions of section 43B for alleged delay in payment of EPF as per the due dates prescribed in the relevant Act.

That your honour in this case payment of both employees and employers contribution to provident fund were made on or before the due date of filling return for the year under consideration, which can be duly inferred from detailed chart and supporting evidences enclosed herewith.

Thus, action of Assessing officer in disallowing EPF of Rs.1,24,444/- is not at all justified in view of amendment made in section 43 B by Finance Act,2003 by omitting second proviso and interpretation of said amendment in the following judicial pronouncement:-

CIT Vs. ALOM EXTRUSIONS LTD. (2009) 319 ITR 306 (SC).CIT Vs. VINAY CEMENT LTD.(2007) 213 CTR 268 (SC),CIT Vs. GEORGE WILLAMSON (ASSAM) LTD.(2006) 284 ITR 619 (GAU.) & CIT Vs. AIMIL LTD. & ORS. (2010) 321 ITR 508 (DEL.) ; (Copies of decisions are enclosed)

It is therefore, your honour is kindly requested to delete the disallowance of EPF of Rs.1,24,444/- and oblige.”

7. The Ld. CIT(Appeals) after considering the submissions of the assessee, assessment order and facts of the case has held as follows:

“10. I have considered the facts of the case and submissions of the appellant. There is substantial merit in the submissions made. Evidently the payments of both the employees and employer contribution to the Provident fund were made on or before the due date of filing of return of income and consequently the disallowance made by the Ld. AO to the extent of Rs.1,24,444/- is hereby deleted. These grounds are therefore allowed.

8. We have perused the case records and given considerable thought to the findings of the Ld. CIT(Appeals). That it is crystal clear from records that the payment of both the employees and employer contribution to the Provident fund were made on or before the due date of filing of return of income. We are guided by the binding of decisions in the case of **CIT Vs. Alom Extrusions Ltd. (2009) 319 ITR 306 (SC)**, **CIT Vs. Vinay Cement Ltd. (2007) 213 CTR 268 (SC)**, **CIT Vs. George Williamson (Assam) Ltd. (2006) 284 ITR 619 (GAU.)** & **CIT Vs. Aimil Ltd. & ORS. (2010) 321 ITR 508 (DEL.)**, hence, relief provided to the assessee by the Ld. CIT(Appeals) is hereby sustained. Thus, **Ground No.2 raised in appeal by the Revenue is dismissed.**

9. In the result, **appeal of the Revenue is partly allowed for statistical purposes.**

Order pronounced on 16th day of January, 2020.

Sd/-

D. KARUNAKARA RAO
ACCOUNTANT MEMBER

Sd/-

PARTHA SARATHI CHAUDHURY
JUDICIAL MEMBER

पुणे / Pune; दिनांक / Dated : 16th January, 2020.

SB

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(Appeals)-II, Nagpur.
4. The CIT-III, Nagpur.
5. विभागीय प्रतिनिधि , आयकर अपीलीय अधिकरण,
नागपुर / DR, ITAT, Nagpur.
6. गार्ड फ़ाइल / Guard File.

// True Copy //

आदेशानुसार / BY ORDER,

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

		Date	
1	Draft dictated on	16.01.2020	Sr.PS/PS
2	Draft placed before author	16.01.2020	Sr.PS/PS
3	Draft proposed and placed before the second Member		JM/AM
4	Draft discussed/approved by second Member		AM/JM
5	Approved draft comes to the Sr. PS/PS		Sr.PS/PS
6	Kept for pronouncement on		Sr.PS/PS
7	Date of uploading of order		Sr.PS/PS
8	File sent to Bench Clerk		Sr.PS/PS
9	Date on which the file goes to the Head Clerk		
10	Date on which file goes to the A.R		
11	Date of dispatch of order		