

आयकर अपीलिय 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 Nos.253 & 254/NAG/2018

निर्धारण वर्ष / Assessment Years : 2009-10 & 2010-11

M/s. Western Coalfields Ltd.
Coal Estate, Civil Lines,
Nagpur-400 001.
PAN : AAACW1578L

.....अपीलार्थी / Appellant

बनाम / V/s.

The Deputy Commissioner of Income Tax (TDS),
Circle-2, Nagpur.

.....प्रत्यर्थी / Respondent

Assessee by : Shri K.P. Dewani

Revenue by : Shri Milind Bhusari

सुनवाई की तारीख / Date of Hearing : 17.01.2020

घोषणा की तारीख / Date of Pronouncement : 21.01.2020

आदेश / ORDER

PER PARTHA SARATHI CHAUDHURY, JM :

These two appeals preferred by the common assessee emanates from the common order of the Ld. CIT(Appeals)-19, Mumbai, Camp Office Nagpur dated 11.01.2013 for the assessment years 2009-10 & 2010-11 as per the grounds of appeal on record.

Condonation of Delay by 2054 days

2. At the outset, we notice that the present appeal is time barred by 2054 days. The assessee has filed an affidavit along with condonation of delay petition.

3. The Ld. AR of the assessee has referred to the decision of the Hon'ble Bombay High Court in the case of **Anil Kumar Nehru Vs. ACIT, Circle 16(2), Mumbai, Income Tax Appeal (L) No.1448 of 2016 dated 13th January, 2017** wherein the Hon'ble High Court rejected the plea of the assessee of condonation of delay stating that reasons stated by the assessee is not bona-fide reason and therefore, delay cannot be condoned. Thereafter, the assessee therein preferred SLP before the Hon'ble Supreme Court in **Civil Appeal No.(s) 11750/2018 (arising out of Special Leave Petition (C) No.(s) 15715/2017 in the case of Anil Kumar Nehru Vs. ACIT, Circle 16(2), Mumbai**, wherein the Hon'ble Supreme Court has held that the High Court should not have taken such a technical view of dismissing the appeal in the instant case on the ground of delay, when it has to decide the question of law between the parties in any case in respect of earlier assessment year. For this reason, the Hon'ble Supreme Court set aside the order of the High Court; condoned the delay for filing the appeal and directed to decide the appeal on merits. The Ld. AR further referred to the decision in the case of **DCIT Vs. Atlas Copco (India) Ltd. in ITA No.649/PUN/2013 & ITA No.1726/PUN/2014 & CO Nos.34 & 35/PUN/2019** wherein the Tribunal has condoned the delay of 1965/1018 days by observing as follows:

"2. The Cross objection for the A.Y. 2008-09 is late by 1965 days. Similar cross objection filed by the assessee for the A.Y. 2009-10 is also late by 1018 days. The assessee has moved an application for condonation of delay. The ld. AR submitted that the assessee was not properly advised by its then counsel for espousing the legal issue now sought to be raised

in the Cross objections, which is fundamental in nature. The ld. DR strongly opposed the condonation of delay.

3. It is seen that through the Cross objections, the assessee has raised a legal ground challenging the validity of assessment order passed u/s.143(3) r.w.s. 144C of the Income-tax Act, 1961 (hereinafter also called 'the Act'). The moot point is as to whether such a long delay deserves condonation. At this stage, it is relevant to note the judgment of the Hon'ble Bombay High Court in Vijay Vishin Meghani Vs. DCIT & Anr (2017) 398 ITR 250 (Bom) holding that none should be deprived of an adjudication on merits unless it is found that the litigant deliberately delayed the filing of appeal. Similar to the cases under consideration, in that case too, delay of 2984 days crept in due to improper legal advice. Relying on Concord of India Ins. Co. Limited VS Nirmala Devi (1979) 118 ITR 507 (SC), the Hon'ble jurisdictional High Court condoned the delay.

4. In yet another case in Anil Kumar Nehru and Another vs. ACIT (2017) 98 CCH 0469 BomHC, there was a delay of 1662 days in filing the appeal. Such a delay was not condoned by the Hon'ble High Court. In further appeal, condoning the delay, the Hon'ble Supreme Court in Anil Kumar Nehru vs. ACIT (2018) 103 CCH 0231 ISCC, held that : 'It is a matter of record that on the identical issue raised by the appellant in respect of earlier assessment, the appeal is pending before the High Court. In these circumstances, the High Court should not have taken such a technical view of dismissing the appeal in the instant case on the ground of delay, when it has to decide the question of law between the parties in any case in respect of earlier assessment year. For this reason we set aside the order of the High Court; condone the delay for filing the appeal and direct to decide the appeal on merits.'

5. Turning to the facts of the instant cases, we find that the assessee has raised a legal ground through these Cross objections, which goes to the root of the matter. It would be seen infra that the said legal issue is squarely covered in the assessee's favour by several orders passed by the Tribunal including those by the Pune Benches. Under these circumstances, we condone the delay and take up the Cross objections for disposal on merits."

4. The Ld. DR submitted that he has no objection, if the delay is condoned.

5. We have heard the rival submissions and gone through the condonation petition as well as the affidavit. We have also considered the judicial pronouncements placed before us. We find that reasons specified therein are justified and that the delay cannot be attributed to the deliberate conduct of the assessee neither through intention nor through action. Further, considering the judicial pronouncements as referred hereinabove, we

condone the delay in respect of both these appeals and proceed to hear them on merits.

Adjudication of grounds in appeal Memo

6. At the time of hearing through video conference, the Ld. AR of the assessee submitted that common grounds were raised in both the appeals i.e. whether the assessee has obligation to deduct tax at source in respect to payment made to various Doctors and Hospitals u/s.194J of the Income Tax Act, 1961 (hereinafter referred to as 'the Act'). The Revenue Authorities, therefore, erred in raising demand u/s.201(1) and 201(1A) of the Act. The Ld. AR of the assessee further submitted that the issue raised in the present appeals is squarely covered in favour of the assessee by the Co-ordinate Bench of the Tribunal, Nagpur in ITA Nos. 35 & 36/Nag/2010 for A.Ys. 2007-08 & 2008-09, 72 to 78/Nag/2012 for A.Ys.2009-10 & 2010-11 respectively dated 24.09.2015 wherein the Tribunal has held as follows:

“9. Upon careful consideration we note that the assessee company in this case which is a public sector undertaking has made payments to hospitals and Doctors. These payments are in the nature of medical expense reimbursement to the employees. Instead of making payment directly to the employees, to prevent misuse of such facilities, the assessee company has chosen to make the payment directly to the hospitals and Doctors on behalf of employees. These payments have been duly classified under perquisite to the employees. Appropriate TDS is made from the employees on the perquisite value of medical facility considered as assessable as salary at the hands of the employees. Now the authorities below are of the opinion that the assessee is making payments to the hospitals and Doctors and should have deducted tax at source under section 194J of the I.T. Act.

10. Section 194J of the I.T. Act mandates that a person not being an individual of Hindu Undivided Family who is responsible for paying to a resident any sum by way of various professional/technical services shall at the time of credit of such sum or making of payment make deduction of tax at source.

11. Now we find that first ingredient for attracting section 194J is that the person making the payment to the payee should be responsible for making the payment. In this case we find that the assessee company has no responsibility for making payments to the hospitals and Doctors. The responsibility to make payments is that of the employees who since

they are individuals do not fall under the ken of section 194J. As the facts of the case clearly indicate that the assessee in this case has made payment on behalf of these employee, it cannot be said that there was any responsibility fastening on the assessee to made payment to the hospitals and Doctors due to any contract between the assessee and Doctors/Hospitals.

12. As a matter of fact it has also been a fact that the assessee has in fact made advance payments to the employees on account of medical requirements. These advances upon sanctioning have been directly paid to the Doctors/Hospitals. Later on when the medical facilities have been utilized, the bills have been raised and the bills have been adjusted by debiting to the medical expenditure and crediting to the medical advance. As per the scheme of accounting entry these advances are clearly to the benefit of the assessee's employees.

13. Learned CIT(Appeals) in this regard has referred to Circular no. 8 (supra) of CBDT which has clarified that provisions of section 194J are applicable on payments made by TPA's to Hospitals. Learned CIT(Appeals) has extended this analogy to the present case as well. In our considered opinion the said analogy is not at all applicable to the facts of the case. As rightly pointed out by the learned counsel of the assessee, the TPA (Third Party Administrator) have priority of contract with hospitals and it is in pursuance of which they happen to make payment on behalf of various insured persons to the hospitals. It is the obligation of Third Party Administrator to make payment to hospitals/Doctors towards professional charges. The hospital raised its bill for services rendered on Insurance Companies/TPA and thus there is liability of TDS on them. In the present case before us the medical facility bills are not raised on the assessee company. The assessee company has no liability of making payment to them on its own. The payment is made of the sanctioned amount to the employee directly to the hospitals/Doctors. Hence the assessee company on its own has no obligation to pay hospitals/Doctors. Hence it cannot be said that liability to deduct tax at source as envisaged under section 194J fastens on the assessee on the facts and circumstances of the case. The CBDT Circular cited by the learned CIT(Appeals) is totally on a different content and is not at all applicable on the facts of the case.

14. We further note that another plea of the learned counsel of the assessee is that the complete details as regards to the names of the parties to whom payments are made as well as addresses are on record. All the parties to whom payments have been made are assessed to income-tax and have been discharging the tax obligation. That the Assessing Officer has not brought any evidence on record to show that the payments made by the assessee has resulted into any loss to the Revenue on account of alleged obligation to deduct tax at source under section 194J of the I.T. Act. In this regard learned counsel of the assessee has referred to a catena of case laws for the proposition that onus is on the Revenue authorities to show that there is loss of revenue on account of no deduction of tax at source and the Assessing Officer can raise demand by an order under section 201 of the I.T. Act only after bringing on record loss of revenue.

15. We find that the above is an alternative ground by the learned counsel of the assessee and the same shall operate only if it is held that the payments made by the assessee in this case were exigible for deduction of tax under section 194J of the I.T. Act. As we have clearly held in the preceding paragraphs that there was no liability fastening on the assessee to deduct tax at source in the present case on payments

made to Hospitals and Doctors on behalf of the individual employees which are in the nature of medical advances and medical reimbursement to the employees. In this view of the matter, in our considered opinion, the adjudication on this limb of the learned counsel of the assessee's argument is only of academic interest and we are not inclined to engage into the same. Accordingly in the background of aforesaid discussion, we set aside the orders of the authorities below and hold that there was no liability on the assessee to deduct tax at source under section 194J of the I.T. Act. Accordingly the orders passed by the Assessing Officer under section 201(1)/201(1A) are hereby quashed."

7. We observe this issue has been considered in detail, in the earlier assessment years by the Co-ordinate Bench of the Tribunal, Nagpur. The Ld. DR could not bring any material on record suggesting any fact in favour of the Revenue nor could place any contrary decision of the any other Tribunal/Superior Forum against the findings of the Tribunal which is already on record.

Respectfully, following our findings in assessee's own case in ITA Nos. 35 & 36/Nag/2010 (supra.), we allow this issue in favour of the assessee. Thus, **grounds raised in appeal by the assessee for both the assessment years i.e. A.Y.2009-10 & 2010-11 are allowed.**

8. In the result, **both the appeals of the assessee for assessment year 2009-10 & 2010-11 are allowed.**

Order pronounced on 21st day of January, 2020.

Sd/-
D. KARUNAKARA RAO
ACCOUNTANT MEMBER

Sd/-
PARTHA SARATHI CHAUDHURY
JUDICIAL MEMBER

पुणे / Pune; दिनांक / Dated : 21st 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)-19, Mumbai, Camp Office Nagpur.
4. The CIT(TDS), 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	17.01.2020	Sr.PS/PS
2	Draft placed before author	17.01.2020	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		