आयकर अपीलीय अधिकरण,'सी' न्यायपीठ, चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL , 'C' BENCH, CHENNAI
श्री महावीर सिंह, उपाध्यक्ष एवं श्री जी. मंजुनाथ, लेखा सदस्य के समक्ष
BEFORE SHRI MAHAVIR SINGH, VICE-PRESIDENT
AND SHRI G. MANJUNATHA, ACCOUNTANT MEMBER

आयकरअपीलसं./**I.T.A.Nos.1027 & 1028/Chny/2018**

(निर्धारणवर्ष / Assessment Years: 2013-14 & 2014-15)

The Deputy Commissioner of Income Tax, Central Circle-1(1) Chennai-34.	Vs	M/s. East Coast Constructions & Industries Ltd., 4, Buhari Building, Moores Road, Chennai-600 006.
		PAN: AAACE 1662P
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

अपीलार्थीकीओरसे/ Appellant by	:	Mr.G.Baskar, Advocate
प्रत्यर्थीकीओरसे/Respondent by	:	Mr. M. Rajan, CIT

सुनवाईकीतारीख/Date of hearing	:	02.02.2022
घोषणाकीतारीख /Date of Pronouncement	:	14.02.2022

आदेश / O R D E R

PER G.MANJUNATHA, AM:

These two appeals filed by the Revenue are directed against common order passed by the learned Commissioner of Income Tax (Appeals)-6, Chennai, dated 28.12.2017 and pertain to assessment years 2013-14 & 2014-15. Since, facts are identical and issues are common, for the sake of convenience, these appeals were heard together and are being disposed off, by this consolidated order.

ITA No.1027/Chny/2018 (A.Y.2013-14):

2. The Revenue has raised following grounds of appeal:-

"1. The order of the learned CIT(A) is wholly erroneous on facts of the case and in law.

2. The ld. CIT(A) erred in directing to allow deduction u/s 801A of the Income Tax Act,1961 of Rs.7,13,63,604/- in the assessment order passed u/s 143(3) of the IT Act,1961, for the AY 2013-14 in the assessee's case.

2.1 The CIT(A) having relied on the decision of the Hon'ble ITAT for the AY 2004-05 in the assessee's own case, ought to have appreciated that the said decision of the Hon'ble ITAT was not accepted by the department and an appeal u/s 260A of the IT Act was filed before the Hon'ble High Court and as such the issue has not reached finality.

2.2 The ld. CIT(A) ought to have appreciated that the assessee cannot be termed as a 'developer' as the company was only executing the contract work for the Government authorities and that according to the Explanation to section 8OIA of the IT Act inserted by finance Act 2007(with retrospective effect from 01.04.2000) the assessee is only a works contractor.

2.3 The ld.CIT(A) ought to have appreciated that for claiming the benefit of Section 80IA(4) of the IT Act the twin conditions of investment and execution of project are to be fulfilled and in the instant case, the assessee is not making any investments but is carrying out the contract based on the periodical payments made by the Government authorities and the local authorities keep a portion of the contract amount as retention money which would be released after certification of the quality of work done by the assessee contractor.

2.4 Theld.CIT(A) ought to have taken cognizance to the holding of the Hon'ble ITAT, Chennai in the assessee's own case for A.Y 2003-04, while directing the AO to consider whether the assessee company is a contractor or a developer, held that "if the rate of each work is fixed and the contract is awarded on piecemeal basis, the assessee cannot be construed to be a developer and developer is a person who designs and creates new projects and not merely supply goods to another".

2.5 The ld.CIT(A) ought to have appreciated that, in the present case, the AO has clearly established in the assessment order passed u/s 143(3) of the IT Act, 1961 for A.Y 2014-15 in the assessee's case that the assessee earns income by way of entering into a mere contract agreement for the development of infrastructural facilities which cannot be called as income of the assessee derived from the profits or gains of development of infrastructural facilities and as such ought to have upheld the action of the AO in denying deduction u/s 80IA of the IT Act to the assessee for A.Y 2013-14.

3 The CIT(A) erred in deleting the disallowance of Rs.30,94,52,416/- made by the AO towards expenses relatable to the retention money withheld by the contractees, in the assessment order passed u/s 143(3) of the IT Act,1961, for the AY 2013-14 in the assessee's case.

3.1 The CIT(A) having relied on the decision of his predecessor CIT(A) for the AY2009-10 in the assessee's own case, ought to have appreciated that the said decisionof the ld. CIT(A) was not accepted by the department and appeals filed before the Hon'ble ITAT against the said order.

3.2 The ld. CIT(A) ought to have considered the matching principle of Income and expenditure in as much as the retention money, which was not forming part of the taxable income, the corresponding expenditure requires disallowance and as such ought to have confirmed the disallowance made by the AO.

4. The ld. CIT(A) erred in deleting the disallowance of Rs. 95,495/- made u/s 14A of the IT Act, 1961 r.w. Rule 8D(2)(ii) of the IT Rules, 1962 by the AO in the assessment order passed u/s 143(3) of the IT Act,1961, for the AY 2013-14 in the assessee's case.

4.1 The CIT(A) having relied on the decision of his predecessor CIT(A) for the AY2012-13 in the assessee's own case, ought to have appreciated that the said decision of the id. CIT(A) was not accepted by the department and appeals filed before the Hon'ble ITAT against the said order.

4.2 The ld.CIT(A) ought to have appreciated that the ld.CIT(A) 's order for the AY 2012-13 in turn relied on the decision of CIT(A) in the assessee's own case for the AY 2009-10 wherein, the assessee had submitted break up of interest payments attributable to earning interest income as additional evidences but no such evidences were submitted for the AY 2012-13 and that the order of the ld.CIT(A) was passed merely relying on the earlier decision.

4.3 The ld. CIT(A) ought to have appreciated that for the assessment year under consideration, the assessee has not furnished the breakup details of interest expenditure attributable to earning of the exempt income and as such ought to have confirmed the disallowance made by the AO.

5. The ld. CIT(A) erred in deleting the disallowance of Rs.1,57,28,760/- made u/s2(24)(x) r.w.s 36(1)(va) of the Income Tax Act,1961, by the Assessing Officer (AO) towards belated payment of employees's contribution to Provident Fund(PF) of Rs.1,55,13,179/- and Employee State Insurance(ESI) of Rs.2,15,581/ - in the assessment order passed u/s 143(3) of the IT Act,1961, for AY 2013-14 in the assessee's case.

5.1 The ld.CIT(A) is not justified in deleting the disallowance made u/s 36(1)(va) relying on the decision of the Hon'ble Madras High Court in the case of M/s Industrial Security & Intelligence India Pvt. Ltd. [TCA No. 585 & 586 of 2015 dt. 24.07.20 15], 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 43B(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.

5.2 The ld.CIT(A) ought to have appreciated that the opening words of section 43B 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 43B 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.

5.3 The ld.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 employee's salary to be credited to the employee's 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)(x) of the IT Act,1961.

5.4 The ld.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 depositedwithin the date by which the assessee as an employer, is required to credit the respective employees's account in the relevant funds under the PF Act and ESI Act, independent of and de hors section 43B of the IT Act.

5.5 The ld.CIT(A) ought to have appreciated that in the present case, the employee's contribution of Rs 1,55,13,179/- towards Provident Fund (PF) and Rs.2,15,581/- 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.

5.6 The ld.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 employee's contribution to welfare funds are governed by section 36(1)(va) of the IT Act.

5.7 The ld.CIT(A) ought to have taken cognizance to the decision of the Honble Gujarat High Court in the case of CIT Vs M/s Gujarat State Road Transport Corporation Ltd.(366 ITR 170), decision of Hon'ble Jurisdictional High Court in the case of CIT Vs M/s Madras Radiators Pressing Ltd. (264 ITR 620), the decision of Honble Kerala High Court in the case of CIT, Cochin Vs M/s Mercham Ltd. reported in (2015) 378 ITR 443 and the decisions of the Hon'ble ITAT, Mumbai in the case of M/s 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.

5.8 The ld.CIT(A) ought to have appreciated that the decision of the Hon'ble Supreme Court in the case of M/s Rajasthan State Beverages Corporation Ltd.[2017]84 taxmann.com 185 is only a dismissal in-limine, without discussion on merits of thecase, of the SLP 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.

5.9 Having regard to the submissions in the foregoing grounds, the ld.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 ESI & PF funds and deeming the same as income of the assessee as provided in section 2(24)(x) r.w.s. 36(1)(va) of the 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.

6. 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."

3. Brief facts of the case are that the assessee company is engaged in the business of civil construction filed its return of income for assessment year 2013-14 on 30.09.2013 declaring total income of Rs.14,49,70,970/- and said return has been subsequently revised on 31.10.2013 declaring total income of Rs.12,71,87,290/-. The assessment has been completed u/s.143(3) of the Income Tax Act, 1961, on 29.03.2016 and determined total income of Rs.15,81,07,180/- by making additions towards disallowance of expenses relatable to withheld income, disallowance u/s.14A r.w. Rule 8D, disallowance of employees contribution to PF & ESI u/s. 2(24)(x) r.w.s 36(1)(va) r.w.s 43B of the Act, and addition on account of non-payment of works contract tax. The assessee carried the matter in appeal before the first appellate authority and the learned CIT(A) for reasons stated in his appellate order partly allowed appeal filed by the assessee, where he has deleted additions made by the Assessing Officer towards disallowance of deduction claimed u/s.80IA of the Act, in respect of profit derived from by an undertaking engaged in the business of infrastructure development, disallowance of

expenses relatable to retention money withheld, disallowance of expenses relatable to exempt income u/s.14A and disallowance of employee's contribution of PF & ESI u/s. 2(24)(x) r.w.s 36(1)(va) of the Income Tax Act, 1961. Aggrieved by the learned CIT(A) order, the Revenue is in appeal before us.

4. The first issue that came up for our consideration from ground no.2 & 3 of the Revenue appeal is deletion of addition made towards disallowance of deduction claimed u/s.80IA of the Income Tax Act, 1961, and disallowance of expenses relatable to retention of money withheld.

5. The learned counsels appeared for the assessee and revenue, have made a statement at bar that this issue is covered by the decision of ITAT., Chennai, in assessee's own case for assessment years 2010-11 to 2012-13, where the Tribunal has set aside the issue to file of the Assessing Officer for reconsideration. Therefore, this year also the issue may be set aside to file of the Assessing Officer to re-examine claim of the assessee in light of agreements entered into by the

assessee for development of infrastructure projects, Explanation to Section 80IA(4) of the Income Tax Act, 1961, and other evidences filed by the assessee.

6. We have heard both the parties, perused material available on record and gone through orders of the authorities below. We find that an identical issue has been considered by the Tribunal right from assessment years 2005-06 to 2012-13, where the Tribunal after considering necessary facts has set aside the issue of deduction claimed u/s.80IA of the Act, and disallowance of expenses relatable to retention money withheld by the principal and directed the Assessing Officer to re-examine the claim in light of agreements entered into by the assessee and also in light of decision of the Hon'ble Gujarat High Court in the case of M/s. Katira Construction Ltd Vs. UOI (352 ITR 513). We further noted that this year also the Assessing Officer has simply disallowed claim of the assessee by considering provisions of section 80IA(4) and Explanation inserted thereto on the ground that the assessee is only a works contractor, but not developer of infrastructure project to

claim benefit of exemption u/s.80IA of the Act, without verifying nature of works undertaken by the assessee in light of agreements entered into between the parties to ascertain whether works executed by the assessee are hit by Explanation to 80IA(4) or not. Therefore, we set aside the issue to file of the Assessing Officer and direct him to reconsider the issue in light of observations of the Tribunal given for earlier assessment years and also in light of agreement between the parties. Hence, we set aside the issue of deduction claimed u/s.80IA(4) and also consequential disallowance of expenses relatable to retention money with held by principal.

7. The next issue that came up for our consideration from ground no.4 of Revenue appeal is disallowance of expenses relatable to exempt income u/s.14A r.w. Rule 8D(ii) of I.T.Rules, 1962. The learned counsel for the Revenue as well as assessee have fairly agreed that this issue is also covered by decision of the ITAT., Chennai in assessee's own case for earlier assessment years, where the Tribunal has set aside the issue to file of the Assessing Officer and directed him to verify

claim of the assessee that no borrowed funds were used for earning dividend income.

8. Having heard both the sides and considered material available on record, we find that the Tribunal has considered an identical issue in earlier years in ITA No. 1431 to 1433/Chny/2016 for assessment years 2010-11 to 2012-13 vide its order dated 14.02.2018, where the Tribunal after considering relevant facts has set aside the issue to file of the Assessing Officer and directed him to re-examine claim of the assessee that no borrowed funds were used for earning dividend income to disallow interest expenses. The Tribunal further noted that in case disallowance if any is required, then it has to be restricted to the extent of dividend income earned for relevant assessment year, as has been held by the Hon'ble Delhi High Court in the case of Joint Investments P.Ltd. (2015) 372 ITR 694. We find that this year also the assessee has taken a similar plea in light of theory of mixed funds and thus, we are of the considered view that the issue needs to go back to file of the Assessing Officer to re-examine claim of the assessee. Hence, we set aside the issue to the file of the

Assessing Officer and direct him to reconsider the issue in light of observations of the Tribunal for earlier assessment years.

9. The next issue that came up for our consideration from ground no.5 of Revenue appeal is disallowance of employee's contribution to PF & ESI u/s. 2(24)(x) r.w.s 36(1)(va) of the Income Tax Act,1961. The Assessing Officer has disallowed employee's contribution to statutory funds on the ground that although the assessee has remitted employee's contribution to statutory funds on or before due date of filing return of income, but such remittance has been made after due date prescribed under respective statutes. It was explanation of the assessee that belated remittance of employee's contribution to PF & ESI is allowable as deduction, if such remittance is made beyond due date specified under respective Acts, but within due date specified u/s.139(1) of the Act, for filing return of income for relevant assessment years.

10. We have heard both the parties, perused material available on record and gone through orders of the authorities below. We find that the issue of deduction towards employees

contribution to PF & ESI after due date specified under respective Acts, but within due date prescribed for filing return of income u/s.139(1) of the Income Tax Act, 1961, as has been considered by the Hon'ble Jurisdictional Madras High Court in the case of M/s Industrial Security & Intelligence India Pvt. Ltd. in TCA No. 585 & 586 of 2015 dt. 24.07.2015, and held that if employees contribution to PF & ESI is remitted before due date for filing of return of income cannot be disallowed, even though such remittance was made beyond due date specified under relevant statutes. In this case, the assessee claims that it has remitted employees contribution to PF & ESI on or before due date specified u/s.139(1) of the Act, for filing return of income. The learned CIT(A), after considering relevant facts has rightly directed the Assessing Officer to verify as to whether payments were made before due date of filing of return of income or not. In case, the assessee made payments on or before due date specified u/s.139(1) for filing of return of income, then additions made by the Assessing Officer should be deleted. We find that finding given by the learned CIT(A) is in accordance with law and is fully covered by the decision of the Hon'ble Madras High Court

in the case of M/s. Industrial Security & Intelligence India Pvt. Ltd. (supra). Hence, we are inclined to uphold findings of the learned CIT(A) and reject ground taken by the Revenue.

11. In the result, appeal filed by the Revenue is treated as partly allowed for statistical purposes.

ITA No.1028/Chny/2018 (A.Y.2014-15):

12. The first issue that came up for our consideration from ground No.2 & 3 of Revenue appeal is denial of deduction claimed u/s.80IA(4) of the Act, and consequent disallowance of expenses relatable to retention money withheld by principal. We find that an identical issue has been considered by us in preceding paragraph in ITA No.1027/Chny/2018 for assessment year 2013-14, where,we, by following decision of the ITAT.,Chennai in assessee's own case for earlier assessment years 2010-11 to 2012-13 in ITA Nos.1431 to 1433/Chny/2016 vide its order dated 14.02.2018, set aside the issue to file of the Assessing Officer and direct the Assessing Officer to reexamine claim of the assessee in light of

agreement between parties, Explanation to Section 80IA(4) of the Income Tax Act, 1961, and decision of the Hon'ble Gujarat High Court in the case of M/s.Katira Construction Ltd. Vs.UOI (supra). The reasons given by us in preceding paragraph No.6 shall equally apply to this appeal, as well. Therefore, for similar reasons we set aside this issue to the file of the Assessing Officer and direct the Assessing Officer to consider the issue in light of our observations given hereinabove.

13. The next issue that came up for our consideration from ground no.4 of Revenue appeal is disallowance of employees contribution to PF & ESI u/s.2(24)(x) r.w.s 36(1)(va) of the Act. We find that an identical issue has been considered by us in preceding paragraph No.10 in ITA No.1027/Chny/2018 for assessment year 2013-14. The reasons given by us in preceding paragraph shall *mutatis and mutandis* apply to this appeal, as well. Therefore, for similar reasons we are inclined to uphold findings of the learned CIT(A) and reject ground taken by the Revenue.

14. In the result, appeal filed by the Revenue is treated as partly allowed for statistical purposes.

15. As a result, appeals filed by the Revenue for both assessment years are partly allowed for statistical purposes.

Order pronounced in the open court on 14th February, 2022

Sd/-	Sd/-
(महावीर सिंह)	(**जी. मंजुनाथ)**
(Mahavir Singh)	(G. Manjunatha)
उपाध्यक्ष/ Vice-President	लेखा सदस्य / Accountant Member

चेन्नई/Chennai,
दिनांक/Dated 14th February, 2022
DS

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. Appellant 2. Respondent 3. आयकर आयुक्त (अपील)/CIT(A)
4. आयकर आयुक्त/CIT 5. विभागीय प्रतिनिधि/DR 6. गार्ड फाईल/GF.