

**IN THE INCOME TAX APPELLATE TRIBUNAL,
KOLKATA BENCH "A", KOLKATA**

**BEFORE SHRI RAJPAL YADAV, VICE-PRESIDENT
AND SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER**

**ITA No.95/Kol/2021
Assessment Year: 2016-17**

SRG EARTH RESOURCES PRIVATE LIMITED 16, Ganesh Chandra Avenue, Gandhi House, Dalhousie, Kolkata – 700013. PAN: AAJCS2276A	Vs.	ACIT, CIRCLE-5(1), Kolkata
(Appellant)		(Respondent)

Present for:

Appellant by : Shri S.S. Gupta, AR
Respondent by : MD. Ghayas Uddin, CIT(DR)

Date of Hearing : 09.02.2022
Date of Pronouncement : 24.02.2022

ORDER

PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:

This appeal is directed against the order passed u/s 263 of the Income-tax Act, 1961 ('the Act'), by the Ld. PCIT, Kolkata-2 for A.Y. 2016-17 vide order dated 22.02.2021.

2. Facts briefly stated as culled out from the records are that the assessee company is engaged in the business of operation and maintenance of Coke Oven Plant for various steel manufacturing companies. The assessee company filed its return of income for the assessment year 2016-17 on 08.10.2016 declaring total income of Rs. 1,46,03,550/-. The case of the assessee company was selected for scrutiny through CASS and statutory notices u/s 143(2) and 142(1) of the Act were issued and duly served upon the assessee company in response to which compliance letters, submissions and copies of

relevant documents were furnished by the assessee company. Assessment order u/s 143(3) of the Income-tax Act, 1961 (the Act) was passed on 14.12.2018 determining total income at Rs. 1,47,86,650/-.

3. Subsequently, Ld. Pr. CIT Kolkata – 2 ('PCIT') invoked the provisions of section 263 of the Act and issued a show cause notice to the assessee company, relevant extracts of which are reproduced below:-

“Whereas the undersigned had called for and examined the record of your case and it is considered that the impugned assessment order passed u/s 143(3) of the I.T. Act, 1961 by the JCIT(OSD), Circle-5(1), Kolkata on 14.12.2018 for A.Y. 2016 is prima facie, erroneous in so far as it is prejudicial to the interests of the revenue for the following reasons.

In the instant case, the assessee company had failed to pay Employees Contribution of Provident Fund amounting to Rs. 76,61,464/- within the due date. Failure to pay within due date the assessee company was not entitled to deduction 36(1)(va) of the IT Act, 1961 and the same was required to be added back to the total income of the assessee company. As the said amount was not added back to the total income of the assessee, it resulted in an under assessment of income of Rs. 76,61,464/- having potential tax effect of Rs. 25,33,110/-.”

4. The assessee company is in appeal before the Tribunal challenging the jurisdiction of Ld. PCIT assumed u/s 263 of the Act by taking the following grounds:-

“1. That the Ld. Pr. CIT erred in law as well as in facts in treating and holding the order passed U/s. 143(3) of the Income Tax Act, 1961 Dt. 14-12-2018 as passed by the Ld. AO, as erroneous in so far as prejudicial to the interests of the revenue in as much as in view of the facts and circumstances of the case, no such treatment was at all called for.

2. That the Ld. Pr. CIT erred in law as well as in facts in setting aside the order U/s. 143(3) Dt. 14-12-2018 to the file of the Ld. AO to pass an appropriate order and in directing the Ld. AO to decide as per CBDT Circular No. 22/2015 Dt. 17-12-2015, in as much as in view of the facts and circumstances of the case, no such directions were at all called for.

3. That the Ld. Pr. CIT erred in law as well as in facts in not considering the decision of the Jurisdictional Hon'ble Calcutta High Court in the case of CIT Vs. Vijay Shree Ltd. [224 Taxman 12(Cal.)(Mag.)] while holding the order U/s. 143(3) Dt. 14-12-2018 as erroneous in as much as in view of the facts and circumstances of the case, such act of the Ld. Pr. CIT is contrary to the Principles of law and legal jurisprudence.

4. That the appellant craves leave to add, alter, change and/or modify any of the grounds of appeal at or before hearing of the appeal and claim further relief or reliefs which is necessary for the ends of justice.”

5. At the outset, Ld. Counsel of the assessee company through its ground no. 3 in the instant appeal placed strong reliance on the decision of Hon'ble Jurisdictional High Court of Calcutta in the case of CIT v. Vijay Shree Ltd. [2014] 224 Taxman 12 (Cal) which upheld the allowability of its claim of deduction in respect of deposit of employee contributions towards Provident Fund and ESIC in the financial year 2015-16 relevant to the assessment year 2016-17 under consideration. Ld. Counsel submitted that even though there was delay in the depositing of employees contribution towards provident fund and ESIC for the year under consideration, most of the contributions had been deposited during the financial year itself for which he referred to tabulated details in clause 20(b) of the Tax Audit Report placed at page 11 of the paper book on record. Ld. Counsel further submitted that the outstanding liabilities as on 31.03.2016 towards provident fund and ESIC were deposited as under:-

“a. Employees Contribution towards PF	Rs. 23,58,574/-
b. Employees Contribution towards ESIC	Rs. 3,06,962/-

The same has been deposited as follows:

<i>Employees' Contribution Provident Fund Payment Detail</i>	
<i>Payment Date</i>	<i>Amount (in Rs.)</i>
04/04/2016	6,14,679
06/04/2016	2,73,566
11/04/2016	4,38,402
06/05/2016	5,90,182
12/05/2016	12,539
14/05/2016	2,08,307
20/05/2016	2,08,632
21/05/2016	12,267
<i>Total</i>	<i>23,58,574</i>

<i>Employees' Contribution ESIC Payment Detail</i>	
<i>Payment Date</i>	<i>Amount (in Rs.)</i>
04/04/2016	1,07,604
08/04/2016	1,01,420
30/04/2016	97,938
<i>Total</i>	<i>3,06,962</i>

Ld. Counsel submitted that all the amounts outstanding as on 31.03.2016 were deposited before the due date of filing of return u/s 139(1) of the Act.

6. Ld. Counsel further submitted that in the case of CIT v. Vijay Shree Ltd. (*supra*), the Hon'ble jurisdictional High Court of Calcutta had upheld the allowability of deduction claimed on account of employees' contribution to provident fund and ESIC paid on or before the due date of filing of return u/s 139(1) of the Act. It was submitted that in the case of the assessee company since most of the deposits have been made during the financial year itself and the outstanding amount as on 31.03.2016 has been deposited before the due to date of filing of return u/s 139(1) of the Act (as tabulated above), no disallowance is called for. Accordingly, Ld. Counsel strongly contended that the assessment order dated 14.12.2018 passed by the Ld. AO u/s 143(3) of the Act is not erroneous in so far as prejudicial to the interest of the revenue and that the impugned order u/s 263 of the Act by the Ld. PCIT be quashed.

7. Per contra, Ld. CIT(DR) vehemently argued supporting the order of Ld. PCIT.

8. We have heard the rival contentions, carefully perused the records placed before us and gone through the judicial precedence relied upon by the Ld. Counsel of the assessee company. We observe that though there was delay in the depositing of employees contribution towards provident fund and ESIC for the year under consideration, it is uncontroverted fact that most of the contributions had been deposited during the financial year itself for which ready reference is made to tabulated details in clause 20(b) of the Tax Audit Report placed at page 11 of the paper book. It is also noted that the outstanding liabilities as on 31.03.2016 towards provident fund and ESIC contributions were deposited as tabulated (*supra*), before the due date of filing of return u/s 139(1) of the Act. Further, it is noted that the due date for filing the income tax return u/s 139(1) of the Act for A.Y. 2016-17 was 30.09.2016 extended to 17.10.2016.

9. We also observe that in the course of proceedings u/s 263 of the Act before the Ld. PCIT, the assessee company had furnished the relevant details and explained the issue raised through the show cause notice by the Ld. PCIT, supporting its contentions by various decisions including that of Hon'ble Jurisdictional High Court in Vijay Shree Ltd. (*supra*).

10. It is well settled law that for invoking the provisions of section 263 of the Act both the conditions that the order must be erroneous and prejudicial to the interest of revenue needs to be satisfied. This ratio stands laid down by various Hon'ble Courts.

11. Before we advert to the facts and law involved in this appeal before us, it is worth apprising ourselves on the law governing the issue involved. In the first place, the assessee company has challenged the very invocation of jurisdiction by Ld. PCIT of his revisional powers u/s 263 of the Act. Therefore, firstly we have to look at the rightful exercise

of revisional powers by the Ld. PCIT for which we have to examine whether in the first place the order of the Assessing Officer found fault by the Ld. PCIT is erroneous in so far as it is prejudicial to the interest of the Revenue.

For that, let us take the guidance of judicial precedence laid down by the Hon'ble Apex Court in the case of Malabar Industries Ltd. vs. CIT [2000] 243 ITR 83 (SC) wherein their Lordships have held that *twin* conditions needs to be satisfied before exercising revisional jurisdiction u/s 263 of the Act by the CIT. The twin conditions are that the order of the Assessing Officer *must be erroneous and so far as prejudicial to the interest of the Revenue*. In the following circumstances, the order of the AO can be held to be erroneous order, that is (i) if the Assessing Officer's order was passed *on incorrect assumption of fact*; or (ii) *incorrect application of law*; or (iii) Assessing Officer's order is in *violation of the principle of natural justice*; or (iv) if the order is passed by the Assessing Officer *without application of mind*; (v) if the AO *has not investigated the issue* before him; [*because AO has to discharge dual role of an investigator as well as that of an adjudicator*] then in aforesaid any of the events, the order passed by the AO can be termed as erroneous order. Looking at the second limb as to whether the actions of the AO can be termed as prejudicial to the interest of Revenue, one has to understand what is prejudicial to the interest of the revenue. The Hon'ble Supreme Court in the case of Malabar Industries (*supra*) held that this phrase i.e. "*prejudicial to the interest of the revenue*" has to be read in conjunction with an *erroneous order* passed by the AO. Their Lordships held that every loss of revenue as a consequence of an order of Assessing Officer cannot be treated as prejudicial to the interest of the revenue. When the Assessing Officer adopted one of the courses permissible in law and it has resulted in loss to the revenue, or where two views are possible and the Assessing Officer has taken one view

with which the CIT does not agree, it cannot be treated as an erroneous order prejudicial to the interest of the revenue unless the view taken by the Assessing Officer is unsustainable in law.

12. Considering the uncontroverted factual details relating to deposit of employee contributions towards provident fund and ESIC before the due date of filing of return u/s 139(1) for the impugned year and the decision of Hon'ble jurisdictional High Court in the case of Vijay Shree Ltd (*supra*) fortifying the claim of the assessee, at the outset, we find that without going into the legal aspect of assessment order of the Ld. AO being erroneous in so far as it is prejudicial to the interest of the revenue, no prejudice is caused to the interest of the Revenue even if it is assumed that the order is erroneous.

Presuming that the impugned order u/s 263 is upheld, the decision of Hon'ble jurisdictional High Court in the case of Vijay Shree Ltd (*supra*) governs the assessment order arising from giving its effect on the treatment of allowability of claim for deposit of employee contributions towards provident fund and ESIC before the due date of filing of return u/s 139(1) for the impugned year. The relevant portion from the decision of Hon'ble jurisdictional High Court in the case of Vijay Shree Ltd (*supra*) is reproduced as under:-

“The only issue involved in this appeal is as to whether the deletion of the addition by the Assessing Officer on account of Employees ‘ Contribution to ESI and PF by invoking the provision of Section 36(1)(va) read with Section 2(24)(x) of the Act was correct or not. It appears that the Tribunal below, in view of the decision of the Supreme Court in the case of Commissioner of Income Tax vs. Alom Extrusion Ltd., reported in 2009 Vol.390 ITR 306, held that the deletion was justified. Being dissatisfied, the Revenue has come up with the present appeal. After hearing Mr. Sinha, learned advocate, appearing on behalf of the appellant and after going through the decision of the Supreme Court in the case of Commissioner of Income Tax vs. Alom Extrusion Ltd., we find that the Supreme Court in the aforesaid case has held that the amendment to the second proviso to the Sec 43(B) of the Income Tax Act, as introduced by Finance Act, 2003, was curative in nature and is required to be applied retrospectively with effect from 1st April, 1988. Such being the

position, the deletion of the amount paid by the Employees' Contribution beyond due date was deductible by invoking the aforesaid amended provisions of Section 43(B) of the Act. We, therefore, find that no substantial question of law is involved in this appeal and consequently, we dismiss this appeal."

13. From the decision above, we observe that where there is a delay in deposit of employees contribution to PF/ESIC as per the due date prescribed under the provisions of PF/ESIC Acts but the contribution is deposited before the due date of filing of return of income, no disallowance is called for u/s 36(1)(va) of the Act.

14. In the fact and circumstance of the case, we respectfully following the decision of the Hon'ble Jurisdictional High Court in the case of Vijay Shree Ltd (*supra*) quash the impugned order of Ld. PCIT passed u/s 263 of the Act and restore the assessment order dated 14.12.2018 passed u/s 143(3) of the Act.

15. In the result, grounds raised by the assessee company are allowed and accordingly the appeal of the assessee is allowed as aforesaid.

Order pronounced in the open court on 24.02.2022.

**Sd/-
(RAJPAL YADAV)
VICE-PRESIDENT**

**Sd/-
(GIRISH AGRAWAL)
ACCOUNTANT MEMBER**

Kolkata, Dated: 24.02.2022.
Biswajit, Sr. P.S.

Copy to:

1. The Appellant: SRG Earth Resources Private Limited
2. The Respondent: ACIT, Circle-5(1), Kolkata
3. The CIT, Concerned, Kolkata
4. The CIT (A) Concerned, Kolkata
5. The DR Concerned Bench

//True Copy//

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata