आयकर अपीलीय अधीकरण, न्यायपीठ – " A" कोलकाता,

IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH: KOLKATA

(समक्ष) **श्री महावीर सिंह,** न्यायीक सदस्य **एवं श्री, आकबर** बाशा, लेखा सदस्य)

[Before Hon'ble Sri Mahavir Singh, JM & Hon'ble Shri Akber Basha, AM]

आयकर अपील संख्या / I.T.A No. 1091/Kol/2010

निर्धारण वर्ष/Assessment Year: 2006-07

Assistant Commissioner of Income-tax Circle-VII, Kolkata.	Vs.	M/s. Vijay Shree Ltd. (PAN-AAACV 9833 B)
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

For the Appellant: Shri A. K. Pramanik
For the Respondent: N o n e

आदेश/ORDER

Per Shri Mahavir Singh/ श्री महावीर सिंह:

This appeal by revenue is arising out of the order of CIT(A), Central-1, Kolkata in Appeal No. 427/CC-VII/CIT(A), C-1/08-09 dated 10.03.2010. The assessment was framed by DCIT, CC-VII, Kolkata, u/s. 143(3) of the Income Tax Act, 1961 (hereinafter referred to as "the Act") for Assessment Year 2006-07 vide his order dated 31.12.2008.

2. The only issue in this appeal of the revenue is against the order of CIT(A) deleting the addition made by the AO on account of employees' contribution to ESI & PF by invoking the provisions of section 36(1)(va) r.w.s. 2(24)(x) of the Act. For this revenue has raised the following two grounds:

> *"1. The Ld. CIT(A) has erred in deleting the addition made u/s. 36(1)(va) read with sec. 2(24)(x) of the I. T. Act, 1961 on account of the employee's contribution to ESI amounting to Rs.14,62,739/- and employee's contribution to P.F. amounting to Rs.59,25,188/- due to non-deposit of the contributions within the due date to the appropriate authority.*
>
> *2. The Ld. CIT(A) has erred in deleting the additions by wrongly invoking the provisions of section 43B since the employee's contribution is not allowed under section 43B on payment basis but under section 36(1)(va) read with section 2(24)(x) and section 43B is attracted in case of employer contribution only."*

3. The brief facts are that the AO disallowed the ESI & PF payments by observing as under:

> *"On going through the Annexure D-1 and D-11 of the TAR it was found that the employees contribution towards P.F. and ESI were not deposited within the due date to the appropriate authority. The assessee submitted that as there was suspension of work they could not paid the same. In view of provisions of section 36(1)(va) read with*

section 2(24)(x) of the I. T. Act, 1961., the employees contribution to PF Rs.59,25,188/- and that to ESI of Rs.14,62,739/- are added back to the total income of the assessee."

Aggrieved, assessee preferred appeal before CIT(A) and CIT(A) deleted the addition by considering the decision of Hon'ble Karnataka High Court in the case of CIT Vs. Sabari Enterprises (2008) 298 ITR 141 (Karn.) and of Hon'ble Apex Court in the case of CIT Vs. Alom Extrusions Ltd. (2009) 319 ITR 306 (SC). Aggrieved, now revenue is in appeal before us.

4. Before us, Ld. Sr. DR argued that the Coordinate Bench in the case of DCIT Vs. M/s. Ashika Stock Broking Ltd., ITA No.1255/K/2010, A.Y. 2007-08 dated 19.11.2010 has considered the issue of Employees' Contribution towards ESI & PF and held the same in favour of the revenue. He argued that this Coordinate bench decision should be followed.

5. We have heard Ld. Sr. DR and gone through facts and circumstances of the case. We find from the order of CIT(A) that PF and ESI payments on account of Employees' contribution were paid within the due dates of filing of return of relevant assessment year and further even the payments made within the grace period provided under respective Acts i.e. The Employee's Provident Fund Act" & "The Employees State Insurance **Act**". We find that the issue is squarely covered in favour of the assessee, as the payments of these contribution are made within the due date of filling of return of income as noted by CIT(A) in his appellate order, by the decision of Hon'ble Delhi High Court in the case of *CIT v. P.M. Electronics Ltd.* (2008) 220 CTR 635 (Del), wherein the issue has been discussed in para-4 as under:-

"4. On 27th Nov., 1998 the assessee had filed a return of income declaring a loss of Rs.8,92,888. On 11th May, 1999 the return was processed under s. 143(1)(a) of the Act. The case of the assessee was selected for scrutiny. Accordingly, a notice dt. 27th Sept., 1999 under s. 143(2) of the Act was issued to the assessee. In response to the notice and on examination of the details submitted by the assessee with respect to provident fund payments made both on account of employer's and employees' share revealed that payments in the sum of Rs.17,94,042 were late as per the provisions of s. 36(1)(va) r.w s. 2(24)(x) and s. 43B. Consequently, the AO disallowed the deduction and added a sum of Rs.17,94,042 towards EPF contribution."

And subsequently decide this issue in para-10 to 14 of Hon'ble Delhi High Court, which read as under:-

"10. In view of the above, it is quite evident that the special leave petition was dismissed by a speaking order and while doing so the Supreme Court had noticed the fact that the matter in appeal before it pertains to a period prior to the amendment brought about in s. 43B of the Act. The aforesaid position as regards the state of the law for a period prior to the amendment to s. 43B has been noticed by a Division Bench of this Court in Dharmendra Sharma *(supra). Applying the ratio of the decision of the Supreme Court in* Vinay Cement *(supra) a Division Bench of this Court dismissed the appeals of the Revenue. In the passing we may also note that a Division Bench of the Madras High Court in the case of* CIT vs. Nexus Computer (P) Ltd. *by*

a judgment dt. 19th Aug., 2008, passed in Tax Case (Appeal) No.1192/2008 [reported at (2008) 219 CTR (Mad.) 54 – Ed.] discussed the impact of both the dismissal of the special leave petition in the case of George Williamson (Assam) Ltd. *(supra) and* Vinay Cement *(supra) as well as a contrary view of the Division Bench of its own Court in* Synergy Financial Exchange *(supra). The Division Bench of the Madras High Court has explained the effect of the dismissal of a special leave petition by a speaking order by relying upon the judgment of the Supreme Court in the case of* Kunhayammed & Ors.Vs. State of Kerala & Anr. *(2000) 162 CTR (SC) 97: 119 STC 505 at p. 526 in para 40 and noted the following observations :*

> *"If the order refusing leave to appeal is a speaking order, i.e., gives reasons for refusing the grant of leave, then the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Art. 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the Court. Tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the apex Court of the country. But, this does not amount to saying that the order of the Court. Tribunal or authority below has stood merged in the order of the Supreme Court rejecting special leave petition or that the order of the Supreme Court is the only order binding as res judicata in subsequent proceedings between the parties."*

11. Upon noting the observations of the Supreme Court in Kunhayammed & Ors. *(supra) the Division Bench of the Madras High Court in the case of* Nexus Computer (P) Ltd. *(supra) came to the conclusion that the view taken by the Supreme Court in* Vinay Cement *(supra) would bind the High Court as it was law declared by the Supreme Court under Art. 141 of the Constitution.*

12. We are in respectful agreement with the reasoning of the Madras High Court in Nexus Computer (P) Ltd. *(supra). Judicial discipline requires us to follow the view of the Supreme Court in Vinay Cement* (supra) as also the view of the Division Bench of this Court in Dharmendra Sharma *(supra).*

13. In these circumstances, we respectfully disagree with the approach adopted by a Division Bench of the Bombay High Court in Pamwi Tissues Ltd. *(supra).*

14. In these circumstances indicated above, we are of the opinion that no substantial question of law arises for our consideration in the present appeal. The appeal is, thus, dismissed."

6. We find that the Hon'ble Delhi High Court in the case of *P.M. Electronics Ltd.* (supra) has decided this issue of payment of Employees contribution towards Provident Fund after considering the decision of Hon'ble Apex Court in the case of Vinay Cement *(supra)* and also distinguished the case law of Hon'ble Bombay High Court in Pamwi Tissues Ltd. *(supra).* We further find that even Hon'ble Karnataka High Court in the case of Sabari Enterprises (supra) has considered this specific issue of Employees' contribution falling under 36(1)(va) r.w.s. 2(24)(x) of the Act and allowed the claim of the assessee by holding as under:

> *"This clause is inserted by the Finance Act with effect from April 1, 1988. The Explanation to this clause is read very carefully. "Due date" has been explained stating that : means the date by which the assessee is required as an employer to credit contribution to the employees' account in the relevant fund under any Act, rule or order or notification issued thereunder or under any standing order, award, contract of service or otherwise." Prior to the above clause was inserted to section 36 giving statutory deductions of payment of tax under the provisions of the Act, section 43B(b)*

was inserted by the Finance Act, 1983, which came into force with effect from April 1, 1984. Therefore, again the provision of section 43B(b) clearly provides that notwithstanding anything contained in the other provisions of the Act including section 36(1) clause (va) of the Act, even prior to the insertion of that clause the assessee is entitled to get statutory benefit of deduction of payment of tax from the Revenue. If that provision is read along with the first proviso of the said section which was inserted by the Finance Act, 1987, which came into effect from April 1, 1988, the letters numbered as clause (a), or clause (c) or clause (d) or clause (e) or clause (f) are omitted from the above proviso and therefore deduction towards the employees contribution paid can be claimed by the assessee. The Explanation to clause (va) of section 36(1) of the Income-tax Act further makes it very clear that the amount actually paid by the assessee on or before the due date applicable in this case at the time of submitting returns of income under section 139 of the Act to the Revenue in respect of the previous year can be claimed by the assessees for deduction out of their gross income. The above said statutory provisions of the Income-tax Act abundantly makes it clear that, the contention urged on behalf of the Revenue that deduction from out of gross income for payment of tax at the time of submission of returns under section 139 is permissible only if the statutory liability of payment of provident fund or other contribution funds referred to in clause (b) are paid within the due date under the respective statutory enactments by the assessees as contended by learned counsel for the Revenue is not tenable in law and therefore the same cannot be accepted by us.

Learned counsel Sri Parthasarathy and Dr. Krishna appearing for the respondents, also drew our attention to the deletion of the second proviso to section 43B of the Income-tax Act by the Finance Act, 2003, which provision has come into force, with effect from April 1, 2004. The reliance placed upon the decision of the apex court in Allied Motors P. Ltd. v. CIT [1997] 224 ITR 677 and also on the decision in General Finance Co. v. CIT (Asst.) [2002] 257 ITR 338 (SC) in respect of applicability of section 43B(b) and also omission of clause (a) or (c) or (d) or (e) or (f) referred to above occurred in the first proviso to section 43B, supports the case of the assessees and also relevant paragraphs extracted from Allied Motor's case [1997] 224 ITR 677 and paragraph 59 referred to supra in this judgment from the Finance Bill with all fours supports the case of the assessee/ respondents. Therefore, we have to answer the substantial question of law No. 1 framed by this court in these appeals at the instance of the Revenue against them, viz., in the negative. Accordingly, we answer the substantial question No. 1 framed in these appeals in the negative."

Even the Hon'ble Supreme Court in the case of Alom Extrusions Ltd. (supra) has clearly discussed the provisions of section 36(1)(va) and held as under:

"In view of the second proviso, which stood on the statute book at the relevant time, each of such assessee(s) would not be entitled to deduction under section 43B of the Act for all times. They would lose the benefit of deduction even in the year of account in which they pay the contributions to the welfare funds, whereas a defaulter, who fails to pay the contribution to the welfare fund right up to April 1, 2004, and who pays the contribution after April 1, 2004, would get the benefit of deduction under section 43B of the Act. In our view, therefore, the Finance Act, 2003, to the extent indicated above, should be read as retrospective. It would, therefore, operate from April 1, 1988, when the first proviso was introduced. It is true that Parliament has explicitly stated that the Finance Act, 2003, will operate with effect from April 1, 2004. However, the matter before us involves the principle of construction to be placed on the provisions of the Finance Act, 2003."

7. In view of the above decisions of Hon'ble Apex Court in the case of Alom Extrusions Ltd. (supra), Vinay Cement (supra) and the decisions of Hon'ble Delhi High Court and

Karnataka High Court, we allow the claim of the assessee and uphold the order of CIT(A) deleting the disallowance made on account of payment made for employees' contribution to ESI and PF. This issue of the revenue's appeal is dismissed.

8. In the result, the revenue appeal is dismissed.

9. Order is pronounced in the open court.

Sd/-	Sd/-
आकबर बाशा, लेखा सदस्य	महावीर सिंह, न्यायीक सदस्य
(Akber Basha)	(Mahavir Singh)
Accountant Member	Judicial Member

(तारीख) Dated 28th April, 2011

वरिष्ठ निजि सचिव Jd.(Sr.P.S.)

आदेश की प्रतिलिपि अग्रेषितः- Copy of the order forwarded to:

1. अपीलार्थी/APPELLANT – ACIT, Central Circle-VII, Kolkata
2. प्रत्यर्थी/ Respondent – M/s. Vijay Shree Ltd., 17 & 48, R.N.R.C. Ghat Road, Howrah-2.
3. आयकर कमिशनर (अपील)/ The CIT(A), Kolkata
4. आयकर कमिशनर/ CIT Kolkata
5. विभागिय प्रतिनीधी / DR, Kolkata Benches, Kolkata

सत्यापित प्रति/True Copy, आदेशानुसार/ By order,

सहायक पंजीकार/Asstt. Registrar.