

IN THE INCOME TAX APPELLATE TRIBUNAL Delhi 'H' BENCH
Before Shri Rajpal Yadav, JM & Shri A.N. Pahuja, AM

ITA No.1020/Del/2012
Assessment Year:2008-09

Date of hearing:15.7.11

Date of drafting:20.7.11

ACIT Central Circle-2 Room no.323,3 rd Floor,ARA Centre,E-2,Jhandewalan Extension,New Delhi	V/s.	M/s Vipul Facility Management Pvt. Ltd.,14/185- 14/186,Ground Floor,Main Shivalik,Malviya Nagar,New Delhi
[PAN:AABCV4229N]		
(Appellant)	..	(Respondent)

Assessee by :-	Shri Rajesh Arora,AR
Revenue by:-	Shri Sanjay Kumar Jain, DR

Date of Hearing:-	06-09-2012
Date of Pronouncement:-	06-09-2012

ORDER

A.N.Pahuja:-This appeal by the Revenue filed on 29.2.2012 against an order dated 5.12.2011 of the Id. CIT (Appeals)-III, New Delhi, raises the following grounds:-

1. *"On the facts and in the circumstances of the case, the Id.CIT(A) has erred in law and on facts in deleting the addition of ₹33,111,56/-made by the Assessing Officer on account of late payment of employees' contribution of ESIC & PF.*
2. *The order of the CIT(A)is erroneous and is not tenable on facts and in law.*
3. *The appellant craves leave to add, to alter, or amend any/all of the grounds of the appeal before or during the course of the hearing of the appeal."*

2. Facts, in brief, as relevant orders are that e-return declaring income of ₹1,50,37,034/- filed on 30th November, 2008 by the assessee, providing management services for large buildings, hospitals, factories etc., was selected for scrutiny with the service of a notice u/s 143(2) of the Income-tax Act, 1961 (hereinafter referred to as the 'Act') issued on 16.3.2009. During the course of

assessment proceedings, the Assessing Officer[AO in short] noticed that the assessee deposited an amount of 33,11,156/-,detailed in para 5 of the assessment order on account of employee's contribution towards PF, beyond the due date prescribed in the relevant enactment. Since the aforesaid contribution was deposited beyond the due date stipulated under the PF Act, the AO disallowed the amount of 33,11,156/-,in terms of provisions of section 2(24)(x) read with sec. 36(1)(va)of the Act.

3. On appeal, the Id. CIT(A),after having a remand report from the AO and comments of the assessee thereon, allowed the claim of the assessee in terms of decision of Hon'ble jurisdictional High Court in CIT Vs. ALMIL Ltd., 321 ITR 508 (Delhi).

4. The Revenue is now in appeal before us against the aforesaid findings of the Id. CIT(Appeals). The Id. DR supported the order of the AO while the Id. AR on behalf of assessee relied upon the decisions of Hon'ble Supreme Court in the case of CIT v. Alom Extrusions Ltd.(2009) 319 ITR 306 (SC) and CIT vs. Vinay Cement Ltd.,213CTR 268(SC) besides decisions in CIT vs. Dharmendra Sharma,297 ITR 320(Del),CIT vs. PM Electronics Ltd.,313 ITR 161(Del.)and ALIMIL Ltd.& others(supra).

5. We have heard both the parties and gone through the facts of the case as also the aforesaid decisions. As regards employer's and employees' contribution towards PF , Hon'ble Delhi High Court in the case of CIT v. P.M. Electronics Ltd., 220 CTR 635 (Delhi) while relying upon the decision of Hon'ble Apex Court in the case of CIT Vs. Vinay Cement Ltd.,213 CTR (SC) 268 , concurred with the view taken by the Hon'ble Madras High Court in Nexus Computer (P) Ltd.,219 CTR(Mad) 54 that employer/employees' contribution towards provident fund payments made after the due date prescribed under the Employees' Provident Fund Act and Rules made thereunder and before the due date for furnishing the return of income under sub sec. 1 of sec. 139 of the Act, are allowable under s.36(1)(va) read with sec. 2(24)(x) and sec. 43B of the Act.

5.1 Moreover, recently Hon'ble Apex Court in the case of CIT vs Alom Extrusions Ltd., 319 ITR 306 (SC) held that the omission of the second proviso to section 43B of the Act by the Finance Act, 2003, operated, retrospectively, with effect from, April 1, 1988 and not prospectively from April 1, 2004. Hon'ble Court observed that earlier under the second proviso to section 43B as amended by the Finance Act, 1989, the assesseees were entitled to deduction only if the contribution stood credited on or before the due date given in the Provident Funds Act. This created further difficulties and on a representation made to the Finance Ministry, one more amendment was made by the Finance Act, 2003. Though this amendment was made applicable with effect from April 1, 2004, the amendment was curative in nature and applied retrospectively with effect from April 1, 1988. It was clarified that when a proviso in a section is inserted to remedy unintended consequences and to make the section workable, the proviso which supplies an obvious omission therein is required to be read retrospectively in operation, particularly to give effect to the section as a whole.

5.2 Hon'ble Karnataka High Court in their decision in ANZ Information Technology P Ltd., 318 ITR 123 while following their earlier decision in CIT vs. Sabari Enterprises, 298 ITR 141 (Kar.) concluded that deposits made by the employer of the employees' contribution belatedly and contribution towards ESI & PF under the relevant enactments can not be treated as income of the assessee u/s 36(1)(va) read with sec. 2(24)(x) in view of provisions of sec. 43B of the Act.

5.3 Hon'ble Delhi High Court in another decision dated 23.12.2009 in CIT Vs. AIMIL Ltd. (Delhi) in ITA no. 1063/2008 now reported in 321 ITR 508 observed that sec. 2(24)(x) provides that amounts received by an assessee from employees towards PF contributions etc. shall be "income". S. 36 (1) (va) provides that if such sums are contributed to the employees account in the relevant fund on or before the due date specified in the PF legislation, the assessee shall be entitled to a deduction. The second Proviso to s. 43B (b) provided that any sum paid by the assessee as an employer by way of contribution to any provident fund shall be allowed as a deduction only if paid on or before the due date specified in 36(1)(va) of the Act. After the omission of the second Proviso w.e.f 1.4.2004, the deduction is allowable under the first Proviso if the payment is made on or before the due date for furnishing the return of income. The Hon'ble High Court while considering whether

the benefit of s. 43B can be extended to employees' contribution as well, which are paid after the due date under the PF law but before the due date for filing the return, held that

(i) Though the Revenue has argued that a distinction is to be made between "employers' contribution" and "employees' contribution" and that employees' contribution being in the nature of trust money in the hands of the assessee cannot be allowed as a deduction if not paid on or before the due date specified in the PF etc law, the scheme of the Act is that employees' contribution is treated as income u/s 2 (24) (x) on receipt by the assessee and allowed as a deduction u/s 36 (1) (va) on making deposit with the concerned authorities. S. 43B (b) stipulates that such deduction would be permissible only on actual payment;

(ii) The question as to when actual payment should be made is answered by Vinay Cements 213 CTR 268 where the deletion of the second Proviso to s. 43B w.e.f 1.4.2004 was held applicable to earlier years as well. As the deletion of the 2nd Proviso is retrospective, the case has to be governed by the first Proviso. Dharmendra Sharma 297 ITR 320 (Del) & P.M. Electronics 313 ITR 161 (Delhi) followed;

(iii) If the employees' contribution is not deposited by the due date prescribed under the relevant Acts and is deposited late, the employer not only pays interest on delayed payment but can incur penalties also, for which specific provisions are made in the Provident Fund Act as well as the ESI Act. Therefore, the Act permits the employer to make the deposit with some delays, subject to the aforesaid consequences. Insofar as the Income-tax Act is concerned, the assessee can get the benefit if the actual payment is made before the return is filed, as per the principle laid down in Vinay Cement. "

5.4 In view of the foregoing and in the light of view taken in the aforesaid decisions , we have no hesitation in holding that the employees' contribution towards PF paid by the assessee before the due date of filing of return u/s 139(1) of the Act for the assessment year under consideration is admissible. Consequently, findings of the Id. CIT(A) are upheld . With these directions, ground no. 1 in the appeal is dismissed.

6. Ground no.2 in the appeal being general in nature, does not require any separate adjudication while no additional ground having been raised before us in terms of residuary ground no.3 in the appeal, accordingly, these grounds are dismissed.

7. No other plea or argument was raised before us.

8. In the result, appeal is dismissed.

Order pronounced in Open Court

Sd/-
(RJPAL YADAV)
(Judicial Member)

Sd/-
(A.N. Pahuja)
(Accountant Member)

Copy of the Order forwarded to:-

1. M/s Vipul Facility Management Pvt. Ltd.,14/185-14/186,Ground Floor,Main Shivalik,Malviya Nagar,New Delhi
2. ACIT Central Circle-2 Room no.323,3rd Floor,ARA Centre,E-2,Jhandewalan Extension,New Delhi
3. CIT concerned
4. CIT (Appeals)-III, New Delhi
5. DR, ITAT,'H' Bench, New Delhi
6. Guard File.

BY ORDER,

Deputy/Asstt.Registrar
ITAT, DELHI