

आयकर अपीलीय अधिकरण, कटक न्यायपीठ, कटक
IN THE INCOME TAX APPELLATE TRIBUNAL CUTTACK BENCH CUTTACK
BEFORE SHRI N.S.SAINI, AM & SHRI PAVAN KUMAR GADALE, JM
ITA No.104/CTK/2018

(निर्धारण वर्ष / Assessment Year :2014-2015)

Das & Sons Infracon Pvt. Ltd., Plot No.710, 7 th Floor, NH-5, Pahal, Bhubaneswar	Vs.	DCIT, Circle-1(1), Bhubaneswar
स्थायी लेखा सं./जीआइआर सं./PAN/TAN No. : AAECD 3471 B		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

निर्धारिती की ओर से /Assessee by : None

राजस्व की ओर से /Revenue by : Mrs. Sarita Mishra Kolhe, CITDR

सुनवाई की तारीख / Date of Hearing : **22/10/2018**

घोषणा की तारीख/Date of Pronouncement **23/10/2018**

आदेश / O R D E R

Per Shri Pavan Kumar Gadale, JM:

This is an appeal filed by the assessee against the order of the CIT(A)-1, Bhubaneswar, dated 21.12.2017 in I.T.Appeal No.0367/16-17 for the assessment year 2014-2015.

2. None appeared on behalf of the assessee when the case was called for hearing, however, an adjournment petition has been filed by the assessee seeking adjournment on the ground that due to strike of Bar Council of Odisha, he could not appear before the Bench, which is not a plausible one and, therefore, we reject the adjournment petition filed by the assessee and decide to dispose off the appeal of the assessee after considering the facts of the case and submissions of Id. DR.

3. The assessee has raised the following grounds of appeal :-

"1. That the disallowance of Depreciation of 6,28,754/- being claim of excess depreciation on vehicle used on hire is

illegal, arbitrary and unjustified to the particular fact and circumstance of the case.

2. *That disallowance of EPF of Rs.12,07,667/- in respect of Employees' contribution U/s 36(l)(va) since amount was paid after due date is illegal, unjustified and uncalled for to the particular facts and circumstances of the case.*
- 3 *That disallowance of ESI of Rs.28,157/- in respect of Employees' contribution U/s 36(l)(va) since amount was paid after due date is illegal, unjust and uncalled for to the particular facts and circumstances of the case.*
- 4 *That the CIT(appeals) was not justified in upholding the addition in respect of EPF of Rs.12,07,667/- in respect of Employees' contribution U/s 36(l)(va), of ESI of Rs.28,157 /- in respect of Employees' contribution U/s 36(l)(va) and Depreciation of 6,28,754/- being claim of excess depreciation on vehicle used on hire to the particular fact and circumstance of the case.*
- 5 *The appellant craves leave to add or amend any grounds of appeal and put forth evidence and argue other grounds during the course of hearing.*
6. *Prayed :-*

That the appellant prays that the addition made in respect of EPF of Rs.12,07,667/-, ESI of Rs.28,157 /-and Depreciation of 6,28,754/- may kindly be deleted and the return income declared by the appellant may kindly be accepted in the interest of justice for which the appellant shall as in duty bound ever pray.”

4. The facts in brief are that the assessee filed return of income electronically on 28.11.2014 for the A.Y.2014-2015 declaring total income of Rs.94,19,360/-. Subsequently the case was selected for scrutiny under CASS and notices u/s.143(2) & 142(1) of the Act alongwith questionnaire were issued. In compliance of the same, Id. AR appeared before the AO and case was discussed. Thereafter the AO completed the assessment assessing total income at Rs.4,76,04,900/-and passed order u/s.143(3) of the Act, dated 30.12.2016 making addition on account of excess depreciation @15%, addition of differential figure in respect of income

received as finance commission and insurance commission as per 26AS and late payment of EPF and ESIC.

5. Aggrieved by the order of AO, the assessee filed an appeal before CIT(A). In the appellate proceedings the CIT(A) after considering the submissions of assessee and findings of the AO, deleted the addition made on account of suppression of gross receipt and confirmed the additions made on account of depreciation @15% and addition made on account of EPF and ESI and partly allowed the appeal of the assessee.

6. Aggrieved by the order of CT(A), the assessee has filed the present appeal before the Tribunal.

7. None appeared on behalf of the assessee, whereas Id. DR relied on the order of AO and CIT(A) and prayed for dismissing the appeal.

8. We have heard the submissions of Id DR and perused the material on record. There are two grounds raised by the assessee in the present appeal first being disallowance of excess depreciation on vehicle used on hire and secondly disallowance on account of late payment of EPF and ESI contribution. In respect of disallowance of excess depreciation on vehicle used on hire, the CIT(A) has dealt on the issue at para 2.2 and observed that assessee though made submissions but could not explain with reasons that the vehicle has been used for running them on hire, whereas the AO after going through the judicial decisions and also on the information submitted found that the assessee being a contractor has used the commercial vehicle for his own business purpose and, therefore, the predominantly use of the assessee and declaration of the vehicles is

for assessee's own business and, therefore, the assessee is not entitled for excess depreciation. We found that the CIT(A) at para 2.2 has dealt on disputed issue and the decision of Hon'ble Apex Court and confirmed the addition made by the AO. The observations of the CIT(A) at para 2.2 are as under :-

"2.2 I have considered the issue at length. The facts and materials available on record have been perused. I am not in a position to agree with the assessee that the commercial vehicles used by the assessee in its own business are entitled to depreciation at the higher rate if given on hire even for a day. The law clearly lays down that higher rate of depreciation is available on vehicles which are used by the assessee in a business of running them on hire. Occasional hiring out of the vehicles will not make the vehicles eligible for higher depreciation. The decision of the Hon'ble Rajasthan High Court in the case of CIT v. Sardar Stones 215 ITR 350 (Raj.) may be relied upon in this regard. The Hon'ble Supreme Court in the case of Gupta Global Exim (P) Ltd. has held that mere inclusion of transportation income in the business income of the assessee is not a determinative factor for deciding whether the vehicles were used by the assessee during the relevant year in a business of running them on hire. This decision of the Hon'ble Supreme Court has set the contention of the assessee to rest. Since the assessee is not involved in a business of running commercial vehicles on hire, it is not entitled to the higher rate of depreciation of 30%. Hence, the AO is fully justified to allow depreciation on commercial vehicles @15%. The disallowance of depreciation of Rs.6,28,754/- is confirmed."

We found that the assessee could not substantiate that the vehicle was used for the purpose of hire either before the AO or before the CIT(A). Therefore, we found that the CIT(A) after considering the factual aspects has confirmed the addition which we are not inclined to interfere and uphold the same. This ground of appeal of the assessee is dismissed.

9. On the second ground of addition made on account of EPF and ESIC, we find that the assessee has deposited the EPF amount of Rs.12,07,667/- and ESI amount of Rs.28,157/- before due date of filing of

the return u/s.139(1) of the Act. The addition was made on the ground that the employees' contribution to EPF & ESI were not deposited within the time prescribed under the P.F.Act. We find that no disallowance can be made for deduction of the same u/s.36(1)(va) r.w.s.2(24)(x) of the Act in view of the decision of Hon'ble Supreme Court in the case of Rajasthan State Beverages Corporation Ltd., [2017] 84 taxmann.com 185 (SC), where it was held as under :-

“ Section 43B, read with section 36(1)(va), of the Income-tax Act, 1961 - Business disallowance - Certain deductions to be allowed only on actual payment (PF and ESI contribution) - High Court by impugned order held that amount claimed on payment of PF and ESI having been deposited on or before due date of filing of returns, same could not be disallowed under section 43B or under section 36(1)(va) - Whether SLP against said impugned order was to be dismissed - Held, yes [Para 2] [In favour of assessee]”

10. Following the judicial precedence, we find in the instant case, it is not in dispute that the contribution to EPF and ESI was deposited by the assessee before due date of filing the return of income u/s.139(1) of the Act. Accordingly, we set aside the orders of lower authorities and direct the AO to delete the addition of employees contribution to EPF of Rs.12,07,667/- and ESI of Rs.28,157/- and allow this ground of appeal of the assessee.

11. In the result, appeal of the assessee is partly allowed.

Order pronounced in the open court on 23/10/2018.

Sd/-
(N. S. SAINI)

लेखा सदस्य / ACCOUNTANT MEMBER

Sd/-
(PAVAN KUMAR GADALE)

न्यायिक सदस्य / JUDICIAL MEMBER

कटक Cuttack; दिनांक Dated 23/10/2018

प्र.कु.मि/PKM, Senior Private Secretary

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant-
Das & Sons Infracon Pvt. Ltd.,
Plot No.710, 7th Floor,
NH-5, Pahal, Bhubaneswar
2. प्रत्यर्थी / The Respondent-
DCIT, Circle-1(1), Bhubaneswar
3. आयकर आयुक्त(अपील) / The CIT(A),
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कटक / DR, ITAT, Cuttack
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

(Senior Private Secretary)

आयकर अपीलीय अधिकरण, कटक / ITAT, Cuttack