In the High Court of Judicature at Madras

Dated : 08.7.2019

Coram :

The Honourable Mr.Justice T.S.SIVAGNANAM

and

The Honourable Mrs.Justice V.BHAVANI SUBBAROYAN

Tax Case Appeal Nos.430 & 421 of 2019 & CMP.No.13978 of 2019

The Principal Commissioner of
Income Tax, Central-1, Chennai-34 ...Appellant

Vs

M/s.Orchid Pharma Ltd. (formerly
known as M/s.Orchid Chemicals &
Pharmaceuticals Ltd.) Chennai-34 ...Respondent

APPEALS under Section 260A of the Income Tax Act, 1961 against the common order dated 13.12.2018 made respectively in ITA.Nos.650 & 651/ Chny/2018 on the file of the Income Tax Appellate Tribunal, Chennai 'D' Bench respectively for the assessment years 2013-14 and 2014-15.

For Appellant : Mrs.R.Hemalatha, SSC for Mr.T.R.Senthilkumar, SSC

COMMON JUDGMENT
(Judgment was delivered by T.S.Sivagnanam,J)

We have heard Mrs.R.Hemalatha, learned Senior Standing Counsel appearing on behalf of Mr.T.R.Senthilkumar, learned Senior Standing Counsel

for the appellant – Revenue. Considering the fact that the assessee was not represented before the Tribunal and that proceedings are pending against the assessee before the National Company Law Tribunal (NCLT), we have not issued notice to the respondent – assessee.

2. These appeals, filed by the Revenue under Section 260A of the Income Tax Act, 1961 (for short, the Act), are directed against the common order dated 13.12.2018 in ITA.Nos.650 & 651/Chny/2018 on the file of the Income Tax Appellate Tribunal, Chennai 'D' Bench respectively for the assessment years 2013-14 and 2014-15.

3. The Revenue has filed these appeals by raising the following substantial question of law :

> *"Whether the Tribunal is correct in law in holding that no disallowance could be made on account of the assessee paying employee's contribution to PF and ESI funds beyond the due dates prescribed under the respective Acts and as per Section 36(va) read with Section 2(24)(x) of the Income Tax Act?"*

4. The Revenue was unsuccessful before the Tribunal, which confirmed the order passed by the Commissioner of Income Tax (Appeals)-3, Chennai-34 [for short, the CIT(A)] in so far as the disallowance under Section 36(1)(va) of the Act.

5. We find from the common order passed by the Tribunal that none appeared for the assessee before the Tribunal. We are informed that the

respondent - assessee is under liquidation and that proceedings are pending before the NCLT. Presumably, for such a reason, the respondent – assessee was not represented before the Tribunal. The Tribunal dismissed the appeals filed by the Revenue by taking note of the decision of this Court in the case of ***CIT Vs. M/s.Industrial Security & Intelligence India Pvt. Ltd. [TCA. Nos.585 and 586 of 2015 dated 24.7.2015]***. We find that the grounds raised by the Revenue before the Tribunal were not considered and more particularly the following grounds :

> *"2.1. The learned CIT(A) is not justified in deleting the disallowance made under Section 36(1)(va) relying on decisions of various Hon'ble High Courts, which held that all contributions to ESI/PF made within the due date under Section 139(1) of the IT Act is deductible under Section 438(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) read with Section 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.*
>
> *.....*
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> *2.5. The learned CIT(A) ought to have appreciated that in the present case, the employee's contribution of Rs.15,79,41,125/- towards Provident Fund (PF) and Rs.1,32,96,164/-*

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 assessment year 2013-14.

2.6. The learned 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 Act.

2.7. The learned CIT(A) ought to have taken cognizance to the decision of the Hon'ble Gujarat High Court in the case of CIT Vs. M/s.Gujarat State Road Transport Corporation Ltd. [(2014) 366 ITR 170], the decision of the Hon'ble Jurisdictional High Court in the case of CIT Vs. M/s.Madras Radiators & Pressings Ltd. [264 ITR 620], the decision of the Hon'ble Kerala High Court in the case of CIT, Cochin Vs. M/s.Merchem 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.No.638/Mum/2012 dated 17.5.2013] wherein it was held that the employee's contribution should be paid within the due date as

provided in the related statutes to be allowed as deduction under Section 36(1)(va) of the Act.

2.8. The learned 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 the case, 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."

6. In our considered view, there have been several other decisions rendered subsequently by other High Courts, which should be taken into consideration because any decision in this regard will have wide ramifications.

7. A Division Bench of the Kerala High Court in the case of ***CIT Vs. M/s.Merchem Ltd. [reported in (2015) 378 ITR 443]*** held in favour of the Revenue. Similarly, another Division Bench of the Kerala High Court in the case of ***Popular Vehicles & Services Private Limited Vs. CIT, Ernakulam [reported in (2018) 96 Taxmann.com 13]*** has recently taken note of all the earlier decisions including the decisions, which have been referred to by the Tribunal and the CIT(A) and held in favour of the Revenue. Considering these facts, we are of the view that the matters should be remanded to the CIT(A) for a fresh consideration. We propose to send the matters back to the CIT(A) for the reason that the CIT(A) did not give a reasoned finding on this aspect while deleting the addition of

Rs.15,79,41,125/- on account of the delay in payment of provident fund and Rs.1,32,96,164/- in respect of the delayed payment of the employees state insurance. Hence, we deem it appropriate that the matters should be remanded to the CIT(A) for a fresh consideration. The CIT(A) should issue notice to the respondent – assessee and take a fresh decision in the matters after taking note of the legal principle laid in the various decisions rendered after the decision in the case of ***CIT Vs. Amil Limited [reported in 321 ITR 508].***

8. Accordingly, the above tax case appeals are allowed and the common order passed by both the CIT(A) as well as the Tribunal are set aside. The matters are remanded to the CIT(A) for a fresh consideration. The substantial questions of law are left open. Consequently, the connected CMP is closed.

08.7.2019

Internet: Yes

To
The Income Tax Appellate Tribunal, Chennai 'D' Bench

RS

T.S.SIVAGNANAM,J
AND
V.BHAVANI SUBBAROYAN,J

RS

TCA.Nos.430 & 431 of 2019
and CMP.No.13978 of 2019

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