

आयकर अपीलीय अधिकरण, चण्डीगढ़ न्यायपीठ "ए", चण्डीगढ़  
IN THE INCOME TAX APPELLATE TRIBUNAL, CHANDIGARH BENCH "A", CHANDIGARH

श्री आकाश दीप जैन, उपाध्यक्ष एवं श्री विक्रम सिंह यादव, लेखा सदस्य  
BEFORE: SHRI. AAKASH DEEP JAIN, VP & SHRI. VIKRAM SINGH YADAV, AM

आयकर अपील सं. / ITA NO. 420/Chd/2021  
निर्धारण वर्ष / Assessment Year : 2019-20

The DCIT CC-II, Ludhiana	बनाम	Shri Anil Kumar Jain, Prop. M/s A.P. Hosiery Industries Luxmi Street, Shivpuri, Ludhiana
स्थायी लेखा सं./PAN NO:ABNPJ3767F		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारित की ओर से/Assessee by : Shri Sudhir Sehgal, Advocate  
राजस्व की ओर से/ Revenue by : Shri Manveet Singh Sehgal, Sr. DR

सुनवाई की तारीख/Date of Hearing : 08/11/2023  
उद्घोषणा की तारीख/Date of Pronouncement : 16/11/2023

**आदेश/Order**

**PER VIKRAM SINGH YADAV, A.M. :**

This is an appeal filed by the Revenue against the order of the Ld. CIT(A)-5, Ludhiana dt. 28/10/2021 pertaining to Assessment Year 2019-20.

2. In the present appeal, the Revenue has raised the following grounds:

1. That the Ld.CIT(A) erred in law, in deleting addition/disallowance of Rs.2,931/- made by the Assessing Officer in respect of delayed payment of employee's contribution, beyond the prescribed time, to the labour welfare Funds like ESI etc.

1(a) That the Ld.CIT(A) erred on facts and law ignoring the distinction between provision of section 36(l)(v) r.w.s 43B and provisions of section 36(l)(va) r.w.s 2(24)(x) of the Income Tax Act, 1961, which clearly provide for different treatment. While the delayed payment of employers contribution is allowable if found before the filing of return wherever employee's contribution is disallowed for once and all if payment is delayed beyond the prescribed time.

1(b) That the Ld.CIT(A) erred in ignoring and failing to take into account the amendment carried out by Finance Act, 2021 by way of inserting Explanation 1 & Explanation 2 below section 36(l)(va) of the Act which has been interpreted by the Hon Tale Appellate Tribunal, Delhi Bench in M/s Vedvan Consultants Pvt. Ltd.,

*New Delhi ITA No. 1312/Del/2020 dated 26.08.2021 which was held that the aforesaid explanation was clarificatory.*

2. *That the Ld.CIT(A) erred in ignoring the Circular No.22/2015 issued by the CBDT."*

3. At the outset, it is noted that present appeal filed by the Revenue was dismissed by the Coordinate Bench vide its order dt. 18/05/2022 and thereafter same was recalled by the Coordinate Bench vide its order dt. 06/10/2023 to be heard on merit , hence, the same has come up for adjudication before us.

4. During the course of hearing, the Ld. DR submitted that though the tax effect in this case is below the limit prescribed by Circular No. 17/2019 dated 08.08.2019 of the CBDT read with Circular No. 03/2018 dated 11.07.2018, the case falls in the exception provided under para 10(b) of the said Circular No. 03/2018 dated 11/07/2018. The Ld. CIT(A) by allowing relief has impliedly held the circular 22/2015 to be illegal. The position of the department vis-à-vis delayed payment of employee's contribution covered u/s 36(1)(va) of the Income Tax Act, 1961 is made amply clear in Para 5 of Circular No. 22/2015 dated 17.12.2015.

5. Per contra the Ld. AR submitted that the whole disallowance made by the AO is only Rs. 2931/- and the tax effect therefore is clearly below the prescribed threshold for filing the appeal by the Revenue. It was further submitted that the present case does not fall under the exception 10 (b) of the CBDT Circular as so referred by the Ld. DR as no order issued by the Board or notification instruction or Circular has been held to be illegal or ultravirus by the Ld. CIT(A).

6. We have heard the Id DR and perused the material available on the record. On going through the CBDT Circular No. 3 of 2018 (supra) and in particular Para 10 of the said Circular, the contents thereof read as under:

*"10. Adverse judgments relating to the following issues should be contested on merits notwithstanding that the tax effect entailed is less than the monetary limits specified in para 3 above or there is no tax effect:*

*(a) Where the Constitutional validity of the provisions of an Act or Rule is under challenge, or*

*(b) Where Board's order, Notification, Instruction or Circular has been held to be illegal or ultra vires, or*

*(c) Where Revenue Audit objection in the case has been accepted by the Department, or*

*(d) Where the addition relates to undisclosed foreign assets/ bank accounts."*

7. We therefore find that the exception so carved in para 10(b) talks about a situation where the Board's order, Notification, Instruction or Circular has been held to be illegal or ultra vires. In the instant case, the CPC Bangalore while processing the return of income has made a disallowance amounting to Rs.2,931/- in respect of delayed payment of employee's contribution towards ESI. During the appellate proceedings before the Id CIT(A), the assessee has submitted that the contribution has been deposited well before the due date of filing the return of income and has relied on various authorities on the subject. The Id CIT(A) considering the submissions and explanation submitted by the assessee and after examining the receipt for deposit of ESI contribution deleted the disallowance so made by the CPC Bangalore while issuing the intimation u/s 143(1) of the Act. We therefore find that the Id CIT(A) has followed the judicial discipline of following the decisions of various authorities on the subject and after examining the date of deposit has allowed the deduction so claimed by the assessee. The Id CIT(A) has not recorded any findings holding any of the CBDT Circular/instructions as illegal or ultra vires. In fact, the Id CIT(A) doesn't have the jurisdiction to challenge the vires of the CBDT Circular. Being the appellate authority, he may not have followed the CBDT Circular as so claimed by the Revenue even though there is nothing on record that any such circular

was brought to his notice, however, not following the CBDT Circular cannot be held by any stretch of imagination as challenging the vires of the CBDT Circular or for that matter, holding it as illegal. In view of the same, we find that the present case clearly doesn't fall under the exception 10(b) of the CBDT's Circular No. 3 of 2018 as so contended by the Id DR before us and we are unable to accede to the said prayer so made on behalf of the Revenue and given that the tax effect involved is well below the prescribed threshold of filing appeal before the Tribunal, we are of the considered view that the appeal so filed by the Revenue deserve to be dismissed on account of low tax effect.

8. Our view is fortified by the decision of **Hon'ble Punjab & Haryana High Court** in case of **Pr. CIT-1 Vs. Sukhwant Singh** (*in ITA No. 283 of 2019 dt. 20/02/2020*) wherein an identical matter relating to the appeal filed by the Revenue as to whether it falls under exception carved out under para 10(b) of CBDT Circular No. 3 of 2018 was under consideration and the Hon'ble High Court has dismissed the appeal filed by the Revenue holding that even the Tribunal has no jurisdiction to declare a CBDT circular ultra vires and therefore, the case does not fall in the exception clause and the contents of the decision read as under:

*"The revenue is in appeal under Section 260A of the Income Tax Act, 1961 (for short, 'the Act') against the order dated 29.10.2018 passed by the Income Tax Appellate Tribunal, Chandigarh (for short, 'the Tribunal'). Following substantial questions of law have been claimed:*

*"1. Whether on the facts and in the circumstances of the case the Ld. Income Tax Appellate Tribunal is right in law in holding that even if a Company advances loans to its Member(s)/Share-holder(s)/Director(s) holding more than 10% of shares therein, and where admittedly such lending is 1 of 7 ITA No. 283 of 2019 [2] not in the usual course of its business, even then, the amounts so advanced, would not be covered under the definition of "dividends" as stated in section 2(22)(e) of the Income Tax Act, 1961 which is clearly contrary to the unambiguous language of the provision?*

*ii) Whether on the facts and in the circumstances of the case, the Ld. Income Tax Appellate Tribunal is right in law in rejecting the finding of the Commissioner of Income Tax (Appeals)-2, Chandigarh that even though the amounts so received*

by the Assessee from the company, a major/considerable part thereof being utilized for meeting Miscellaneous Expenses of the Assessee, still such transaction would take the colour of and/or relate to the usual course of business of the company which had transferred the amount?

(iii) Whether on the facts and in the circumstances of the case, the Ld. Income Tax Appellate Tribunal is right in law in upsetting the well-reasoned and cogent findings as contained in the order passed by the Commissioner of Income Tax (Appeals)-2, Chandigarh even though no reasons in respect thereof have been rendered by it?

(iv) Whether on the facts and in the circumstances of the case and in law, the order of Hon'ble ITAT is perverse stating that there is no exempt income during the year whereas in the return of income, the assessee has claimed total exempt income of Rs. 24,45,132/-, hence the ratio of case of M/s Lakhani Marketing INC is not applicable to the case of the assessee?

(v) Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT has erred in not upholding disallowance of Rs. 11,82,978/- u/s 14A of the Income Tax Act on the ground that disallowance made cannot exceed exempt income without appreciating the fact that there is no such restriction stipulated either in Section 14A of the Income Tax Act or Rule 8D of the Income Tax Rule?

(vi) Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT has erred in not upholding disallowance of Rs. 11,82,978/- u/s 14A of the Income Tax Act on the ground that disallowance made cannot exceed exempt income without appreciating the fact that applicability of Section 14A or Rule 8D does not depend on earning of income as held by Supreme Court in the case of CIT vs. Rajender Prasad Moody (1978), 115 ITR 519?

(vii) Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT has erred in not upholding disallowance of Rs. 11,82,978/- u/s 14A of the Income Tax Act on the ground that disallowance made cannot exceed exempt income without appreciating the fact that there is no such restriction in Section 14A or in rule 8D and further clarified by CBDT Circular No. 5 of 2014?

(viii) Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT has erred in ignoring the 3 of 7 ITA No. 283 of 2019 [4] legislative intent expressed in CBDT's Circular No. 5/2014 dated 11.2.2014, which explicitly states that expenses relatable to earning of exempt income have to be considered for disallowance irrespective of the fact whether any such income has been earned during the F.Y. or not as confirmed by Apex Court in Maxopp Investment Ltd. v. CIT, 91 Taxman.com 154 (SC)?

(ix) Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT has erred in holding that disallowance u/s 14A cannot be made where there is no exempt income, when Supreme Court has upheld the principles of apportionment and department is in SLP on the same issue in the cases of Moderate Leasing and Capital Services Pvt. Ltd. In ITA No. 102 of 2018, A. Y. 2009-10 and Matrix Cellullar Service (P) Ltd. In ITA No. 484 of 2017 and Nilgiri

*Infrastructure Development Ltd. In ITA No. 135 of 2016 and Instant Holding Ltd. in ITA No. 2168 of 2011 and SLP has also been approved against the decision of Hon'ble Jurisdictional High Court in the case of M/s Vardhman Chemtech Private Ltd. in ITA No. 322/2016?*

*(x) Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT has erred in law and fact in following the decision of Hon'ble High Courts whose facts were distinguishable from the assessee, ignoring the principal of apportionment regardless of exempt income laid down by Hon'ble Supreme Court decision in CIT v. Walfori Share and 4 of 7 ITA No. 283 of 2019 [5] Stock Brokers P Ltd., 326 ITR 1 (SC) and upheld by the Hon'ble Supreme Court in 91 Taxman.com 154 (SC)?*

*(xi) Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT has erred in deleting the addition of Rs. 11,82,978/- u/s 14A determined by the AO under rule 8D r.w.s. 14A to apportion interest expenditure incurred to invest in shares and equity instrument in view of the fact that no separate accounts are maintained by the assessee in relation to investments whose income is exempt from tax, and has large borrowed funds ignoring Apex Court decision in 91 Taxman.com 154 (SC)?*

*(xii) Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT has erred in law and fact in following the decision of Hon'ble High Court in Lakhani Marketing decided following decisions in the case of Hero Cycles Ltd., 323 ITR 204 and CIT v. Winsome Textile Industries Ltd., 319 ITR 204 whose facts are distinguishable from the assessee, ignoring the principal of apportionment laid down by Hon'ble Supreme Court decision in CIT v. Walfori Share and Stock Brothers P. Ltd., 326 ITR 1(SC), which has been confirmed in 91 Taxman.com 154 (SC) and thus legislation relying on Winsome Textiles Industries Ltd. stands superceded?"*

The brief facts are that the assessment year involved is 2013-

14. The income tax return was filed claiming deduction under Chapter VI-A of the Act. The case was selected for scrutiny. The Assessing Officer treated the loan received from M/s Acme Builders Private Limited as deemed dividends and made additions under the head "income from other sources". Further disallowance under Section 14A of the Act was also made vide order dated 29.1.2016. The first appeal filed was dismissed on 14.12.2016. The Tribunal allowed the appeal vide order dated 29.10.2018, hence the present appeal of the revenue.

*In the appeal, it is pleaded that the tax effect is `46,91,541/-, however it is argued that the case falls under the exception carved out in para 10(b) of CBDT Circular No.3 of 2018 dated 11.7.2018. The same is reproduced below:*

*"10. Adverse judgments relating to the following issues should be contested on merits notwithstanding that the tax effect entailed is less than the monetary limits specified in para 3 above or there is no tax effect:*

xx xx xx

*(b) Where Board's order, Notification, Instruction or Circular has been held to be illegal or ultra vires, or xx xx xx From the perusal of the order of the Tribunal, it is not forth coming that any notification, order, instruction or circular was dealt with/ relied upon by the Tribunal what to talk about the same being held illegal or ultra vires. Even otherwise, the Tribunal has no jurisdiction to declare a circular ultra vires. In our considered view, the case does not fall in the exception clause.*

*The appeal is dismissed.*

*However, the substantial question of law left open."*

9. In light of aforesaid discussions, we are of the considered view that the present case doesn't fall under exception 10(b) of the CBDT Circular and the appeal so filed by the Revenue is hereby dismissed on account of low tax effect. The contentions on merits of the case have thus become infructious and are not dealt with and thus left open.

10. In the result, the appeal of the Revenue is dismissed.

Order pronounced in the open Court on 16/11/2023.

Sd/-

आकाश दीप जैन  
(AAKASH DEEP JAIN)  
उपाध्यक्ष / VICE PRESIDENT

Sd/-

विक्रम सिंह यादव  
(VIKRAM SINGH YADAV)  
लेखा सदस्य/ ACCOUNTANT MEMBER

AG

Date: 16/11/2023

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

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकर आयुक्त/ CIT
4. आयकर आयुक्त (अपील) / The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय आधिकरण, चण्डीगढ़/ DR, ITAT, CHANDIGARH
6. गार्ड फाईल/ Guard File

आदेशानुसार/ By order,  
सहायक पंजीकार/ Assistant Registrar