IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "C" NEW DELHI

BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
&
SHRI VIJAY PAL RAO, JUDICIAL MEMBER

I.T.A. No.622/DEL/2018
Assessment Year 2014-15

Indian Geotechnical Services, C-91, G.F. Shivalik, Malviya Nagar, New Delhi.	v.	ACIT, Circle-61(1), E-2, Pratyakshakar Bhawan, Civic Centre, New Delhi.
TAN/PAN: AAAFI2029M		
(Appellant)		(Respondent)

Appellant by:	Shri Brij Kishor Anand, C.A.		
Respondent by:	Ms. Anima Barnwal, Sr.D.R.		
Date of hearing:	24	08	2021
Date of pronouncement:	27	08	2021

O R D E R

PER VIJAY PAL RAO, J.M.

This appeal by the Revenue is directed against the order dated 28.11.2017 of Commissioner of Income Tax (Appeals)-XX, New Delhi for the Assessment Year 2014-15. The Revenue has raised the following grounds of appeal as under:

"1(a) That on the facts and in the circumstance of the case the learned CIT(Appeals) erred in confirming the addition of Rs.8,20,480 being the difference as per the accounts of the assessee and the amount on which TDS had been deducted by the party as per Form 26AS.

(b) That the authorities below erred in not holding that income of a taxpayer is not to be computed merely with the reference TDS certificates or details but the assessment of income is to be as per the method of accounting regularly employed by the taxpayer

and further erred in making an addition of Rs.8,20,480 on basis of TDS amounts appearing in Form 26AS.

(2) That the learned CIT(Appeals) erred in confirming the disallowance of Rs.1,16,779 out of Rs.1,70,120 being late deposit of Employees share towards Provident Fund & ESI Contribution notwithstanding that the amounts had been deposited before the due date of filing the tax return."

2. Ground No.1 is regarding addition made by the Assessing Officer on account of difference of the gross receipts shown in the 26AS in comparison to the return of income filed by the assessee. During the assessment proceedings, the AO noted that assessee has not declared the income to the tune of Rs.8,20,480/- received from Tata Consulting Engineers Ltd. [TCE] as appearing in 26AS. The Assessing Officer accordingly added the said amount in the income of the assessee. On appeal the assessee contended that the said amount of Rs.8,20,480/- does not pertain to any of the bill issued by the assessee but the amount was wrongly shown in the account of the assessee. However, the CIT(A) has confirmed the addition made by the Assessing Officer on the ground that the assessee has failed to reconcile the difference of the gross receipt as shown in 26AS.

3. Before us, the ld. AR of the assessee has submitted that the assessee has clearly explained the fact that this amount of Rs.8,20,480/- does not relate to any bill raised by the assessee to Tata Consulting Engineers Ltd. The assessee also submitted that the assessee has written various mails to TCE

but the other party has not rectified the amount as shown in 26AS. The ld. AR has contended that it was not in the control of the assessee to get the mistake rectified in 26AS but it was sole responsibility of the Tata Consulting Engineers Ltd. to rectify the mistake by filing correct TDS statements. Thus, he has contended that the Assessing Officer has made the addition without conducting any enquiry from other party to get the facts verified and CIT(A) has confirmed the said addition even without asking the Assessing Officer to verify the facts through remand proceedings. Hence, the ld. AR has pleaded that once the assessee has explained that this amount is wrongly shown in the PAN of the assessee by the Tata Consulting Engineers Ltd. then the same cannot be treated as income of the assessee.

4. On the other hand, the ld. DR has submitted that the assessee is having various transactions with Tata Consulting Engineers Ltd. The other transactions except these two transactions are not disputed by the assessee, therefore, the onus is on the assessee to reconcile the difference and produce the correct gross receipt confirmation from the other party. She has relied upon the order of the authorities below.

5. We have considered the rival submissions as well as relevant material on record. The addition has been made by the Assessing Officer on account of differences on the gross receipts as shown in 26AS in comparison to the return of income declared by the assessee. This differential amount of Rs.8,20,480/- is shown in 26AS receipt from the deductor,

Tata Consulting Engineers Ltd. The assessee has been contending right from the beginning that this amount does not pertain to any of the bills raised by the assessee to TCE but it was mistakenly reported in 26AS. The CIT(A) while deciding this issue has given the details of the receipts shown in 26AS from TCE in paragraph 4.4.3 and 4.4.4 as under:

> *4.4.3 The contention of the Assessing Officer and the submission of the appellant has been considered and it is gathered that as per 26AS the party Tata Consulting Engineers Ltd. has shown the following:-*

	Name of Deductor				*TAN of Deductor*	*Total Amount Paid/Credited*	*Total Tax Deducted*	*Total TDS Deposited*
	TATA CONSULITNG ENGINEERS LIMITED				*MUMT06 732F*	*1837922.00*	*183793.00*	*183793.00*
s.n.	*Section*	*Transaction Date*	*Status of Booking*	*Date of Booking*	*Remarks*	*Amount paid/Credited*	*Tax Deducted*	*TDS Deposited*
1	*194J*	*31-Mar-2014*	*F*	*20-May-2014*	*"*	*462280.00*	*46228.00*	*46228.00*
2	*194J*	*31-Mar-2014*	*F*	*20-May-2014*	*"*	*358200.00*	*35820.00*	*35820.00*
3	*194J*	*31-Dec-2013*	F	*15-Jan-2014*		*436856.00*	*43686.00*	*43686.00*
4	*194J*	*31-Dec-2013*	F	*15-Jan-2014*	*"*	*580586.00*	*58059.00*	*58059.00*

> *From this, it is apparent that this party has shown the transactions totaling Rs.18,37,922/- on which the tax of Rs.1,83,793/- was deducted and deposited in the government account. Now the appellant claims that the bills of Rs. 4, 62,280/- and Rs. 36, 58,200/- are not raised by the appellant. This dispute, the appellant has to settle with the party Tata Consulting Engineers Ltd. As the third party is showing specific transaction date with specific date of deducting TDS and TDS was also deposited in the Government account, unless this 26AS is revised by the said party*

the difference of 26AS is not reconciled by the appellant. The onus is on the appellant to prove that such difference has occurred by wrong entry made by Tata Consulting Engineers Ltd. No confirmation of the party Tata Consulting Engineers Ltd. or any revised 26AS till the date could be filed by the appellant during the course of appellate proceedings. The only evidence in support of the claim was an e-mail sent by the appellant to the party objecting this.

4.4.4 In this light, 1 have no reason to interfere in the decision of the Assessing Officer in making the addition of Rs. 8,20,480/- which is the difference of gross receipt as per 26AS and gross receipt as per Return of Income and the addition of Rs.8,20,480/- is confirmed. However, the appellant has claimed that the corresponding TDS which was deducted on this amount has not been claimed by the appellant in the Return of Income. From the assessment order, the Assessing Officer is also silent on this issue whether this TDS credit was given or not. In this light, the Assessing Officer is directed to verify this and if the credit is not given, the corresponding TDS credit of Rs. 82,048/- is to be given as the amount of Rs.8,20,480/- has been added by the Assessing Officer in the total income."

6. It is clear from the impugned order that the Assessing Officer has made the addition on the presumption that the amount shown in 26AS is the actual gross receipt of the assessee from TCE without conducting any verification of the facts and CIT(A) has confirmed this addition on the ground that assessee has failed to reconcile this difference. It is pertinent to note that once the assessee has disputed the said amount pertaining to any of the bills raised by the assessee, then a proper enquiry ought to have been conducted by the

AO to verify this fact. The assessee has expressed its inability to force the other party to rectify the TDS statement and consequently 26AS. Therefore, in the facts and circumstances of the case, we set aside this issue to the record of the Assessing Officer for conducting a proper enquiry by calling upon the necessary information from TCE and then decide the issue. Needless to say, the assessee be given a proper opportunity of hearing before passing a fresh order.

7. Ground No.2 is regarding disallowance made by the AO in respect of delay for depositing the employees contribution to ESI and PF. The assessee has deposited the employees contribution to ESI and PF belatedly but before due date of filing the return of income u/s. 139(1) of the Act. The AO relied upon the CBDT Circular No.22/2015 as well as Section 36(1)(va) read with Section 2(24)(x) of the Income Tax Act and held that the contribution to PF and ESI is upto the due date provided in the respective statement is allowable deduction and not upto due date of filing of return. The Assessing Officer accordingly disallowed sum of Rs.1,70,120/-.

8. On appeal, the ld. CIT(A) has confirmed the disallowance made by the Assessing Officer.

9. Before us, the ld. AR of the assessee has submitted that there are binding precedents on this issue wherein the Hon'ble High Court as well as the Hon'ble Supreme Court has held that the payment of employees contribution regarding PF and ESI before the due date of filing of return of income u/s.139(1) is an allowable claim as per the provision of

Section 43B of the Income Tax Act. He has relied upon the decision of Hon'ble Jurisdictional High Court in the case of **CIT vs. Aimil Ltd.** as reported in **(2009) 321 ITR 508 (Delhi)**.

10. On the other hand, ld. DR has submitted that there are decisions in favour of the Revenue wherein the Hon'ble High Courts have held that the amendment by Finance Act, 2015 in Section 43B is restricted only in respect of employer's contribution to PF and ESI and if the same is paid on or before the due date of filing of income u/s. 139(1), the same is allowable u/s.43B of the Income Tax Act. However, the said amendment would not be applicable for the belated payment of employee's contribution to PF and ESI. The ld. DR has further contended that since the assessee has received the money as deducted from the salary of the employees and kept with him without making the payment to the government account therefore, the concession given in Section 43B is not available with respect to employee's contribution. She has also referred to the latest amendment in the provisions of Section 43B as well as Section 36(1)(va) and submitted that the Explanation 2 inserted by Finance Act, 2021 clarifies that the definition of income as provided in Section 2(24)(x) remain unchanged and provision of Section 43B does not apply and deemed to never have been applied for the purpose of determining the due date of payment of employees contribution to PF and ESI. She has relied upon the order of the Assessing Officer and CIT(A).

11. We have considered the rival submissions as well as relevant material on record. There is no quarrel that if the strict interpretation is given to Section 2(24)(x) r.w.s. 36(1)(va) as well as Section 43B the amount of employees contribution received by the assessee would be treated as income of the assessee if the same is not deposited in the Government account within the due date as prescribed under the respective Acts. The provision of Section 43B are restrictive in nature and is not an enabling provision to allow deduction which is otherwise not allowable under the provision of Sections 28 to 38 of the Income Tax Act. The employees contribution received by the assessee is firstly treated as income u/s.2(24(x) and then a deduction is allowed u/s.36(1)(va) if the said amount is deposited in the Government account before the due date as provided in clause (va) of Section 36(1) as defined in Explanation-1 which means the due date provided under the relevant Act governing the relevant fund. However, the Hon'ble High Courts have considered this issue and given the benefit of Section 43B even in case of employees contribution which was paid by the assessee on or before due date of filing of return of income u/s.139(1) of the Act. In the case of **CIT vs. Aimil Limited (supra),** the Hon'ble Jurisdictional High Court has again considered this issue and held in paragraphs 14 to 19 as under:

> *"14. When we keep that proposition in mind and also take into consideration various judgments where Vinay Cement*

(supra) is applied and followed, it will not be possible to accept the contention of the Revenue.

15. In CIT v. Dharmendra Sharma, 297 ITR 320, this Court specifically dealt with this issue and relying upon the aforesaid judgment of the Guwahati High Court, as affirmed by the Supreme Court in Vinay Cement (supra), the appeal of the Revenue was dismissed. More detailed discussion is contained in another judgment of this Court in CIT v. P.M. Electronics Ltd. (ITA No. 475/2007 decided on 3.11.2008). Specific questions of law which were proposed by the Revenue in that case were as under :-

> *"(a) Whether amounts paid on account of PF/ESI after due date are allowable in view of Section 43B, read with Section 36(1)(va) of the Act?*
>
> *(b) Whether the deletion of the 2nd proviso to Section 43B by way of amendment by the Finance Act, 2003 is retrospective in nature?"*

16. These questions were answered by the Division Bench in the following manner :-

> *"7. Having heard the learned counsel for the Revenue, as well as, the assessee, we are of the view that the view taken by the Tribunal deserves to be sustained as it is no longer res integra in view of the decision of the Supreme Court in the case of CIT v Vinay Cement Ltd: 213 ITR 268 which has been followed by a Division Bench of this Court in the case of CIT v. Dharmendra Sharma: 297 ITR 320.*
>
> *8. Despite the aforesaid judgments, the learned counsel for the Tribunal has contended that in view of the judgment of*

the Division Bench of the Madras High Court in the case of CIT v. Synergy Financial Exchange Ltd: (2007)288 ITR 366 and that of the Division Bench of the Bombay High Court in the case of CIT v. M/s Pamwi Tissues Ltd: (2008) Taxindiaonline.com 104 (TIOL) the issue requires consideration. According to us, in view of the dismissal of the Special Leave Petition in the case of Vinay Cement (supra) by the Supreme Court by a speaking order, the submission of the learned counsel for the Revenue has to be rejected at the very threshold. The reason for the same is as follows:-

9. The Gauhati High Court in the case of CIT v. George Williamson (Assam) Ltd: (2006) 284 ITR 619 (Gauhati) dealt with the very same issue. In the said judgment the Division Bench of the Gauhati High Court noted a contrary view taken by the Kerala High Court in the case of CIT v. South India Corporation Ltd: (2000) 242 ITR 114. After noting the said judgment the fact that the amendments had been made to the provisions of Section 43B of the Act by virtue of Finance Act, 2003 w.e.f 1.4.2004 it agreed with the submission of the learned counsel for the assessee that by virtue of the omission of the second proviso and the omission of Clauses (a), (c), (d), (e) and (f) without any saving clause would mean that the provisions were never in existence. For this purpose, in the said case the assessee had placed reliance on the judgment of a Constitution Bench of the Supreme Court in the case of Kolhapur Canesugar Works Ltd v. Union of India: (2000) 2 SCC 536 and Rayala Corporation P. Ltd v. Director of Enforcement (1969) 2 SCC

412 and General Finance Co. v. Asst. CIT: (2002) 257 ITR 338 (SC) . The said submissions found favour with the Division Bench of the Guahati High Court and relying on earlier decisions of its own Court in CIT v. Assam Tribune: (2002) 253 ITR 93 and CIT v. Bharat Bamboo and Tiber Suppliers: (1996) 219 ITR 212 the Division Bench dismissed the appeal of the Revenue. It transpires that the aforesaid matter was taken up in appeal alongwith other matters including Vinay Cement (supra). The order in Vinay Cement (supra) was passed by the Supreme Court on 7.3.2007 wherein it observed as follows:- "Delay condoned. In the present case we are concerned with the law as it stood prior to the amendment of Section 43-B. In the circumstances, the assessee was entitled to claim the benefit in Section 43-B for that period particularly in view of the fact that he has contributed to provident fund before filing of the return. Special Leave Petition is dismissed."

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 pertain to a period prior to the amendment brought about in Section 43B of the Act. The aforesaid position as regards the state of the law for a period prior to the amendment to Section 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 v. Nexus Computer (P) Ltd by a judgment dated 18.8.08 passed in Tax Case (A) No. 1192/2008 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 and Others v. State of Kerala and another: 119 STC 505 at page 526 in Paragraph 40 and noted the following observations:-

"It the order refusing leave to appeal is a speaking order, ie., 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 Article 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 and Others (supra) the Division Bench of the Madras High Court in the case of Nexus Computer Pvt 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 non declared by the Supreme Court under Article 141 of the Constitution. 12. We are in respectful agreement with the reasoning of the Madras High Court in Nexus Computer Pvt 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 M/s 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."

17. It also becomes clear that deletion of the 2nd proviso is treated as retrospective in nature and would not apply at all. The case is to be governed with the application of the 1st proviso.

18. We may only add that 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 by the Supreme Court in Vinay Cement (supra).

19. We, thus, answer the question in favour of the assessee and against the Revenue. As a consequence, the appeals filed by the assessees stand allowed and those filed by the Revenue are dismissed."

12. Thus, it is clear that there are series of decisions of various High Courts on this issue wherein it was held that the payment of employees contribution if made before due date of filing of return of income u/s.139(1), the same is allowable deduction against the corresponding income of the said amount treated as per the provision of Section 2(24)(x) of the Income Tax Act. We are conscious about the decisions of other High Court taking a different view on this issue. However, the decision of the Hon'ble Jurisdictional High Court is binding on the Tribunal. By the Finance Act, 2021, the provision of Section 36(1)(va) as well as Section 43B have been amended to this extent by inserting the Explanation-2 whereby it is clarified that the provision of Section 43B shall not apply and shall be deemed never to have been applied for the purpose of determining the due date under this clause. For ready reference, we reproduce the Explanation-2 to Section 36(1)(va) as under:

*"**Section 36(1)(va)***
[Explanation 2 – *For the removal of doubts, it is hereby clarified that the provisions of section 43B shall not apply and shall be deemed never to have been applied for the purposes of determining the "due date" under this clause;]"*

13. This amendment is brought in the statute to provide certainty about the applicability of Section 43B in respect of belated payment of employee's contribution. We further noted that the memorandum of Finance Bill, 2021 whereby this amendment was proposed and the relevant clause to the said memorandum clearly intended the amendment shall take effect from 1st April, 2021 and will accordingly apply to the Assessment Year 2021-22 and subsequent year. Clause 8 and 9 of the said memorandum is relevant which are reproduced hereunder:

""Rationalisation of various Provisions

Payment by employer of employee contribution to a fund on or before due date

Clause (24) of section 2 of the Act provides an inclusive definition of the income. Sub-clause (x) to the said clause provide that income to include any sum received by the assessee from his employees as contribution to any provident fund or superannuation fund or any fund set up under the provisions of ESI Act or any other fund for the welfare of such employees."

Section 36 of the Act pertains to the other deductions. Sub-section (1) of the said section provides for various deductions allowed while computing the income under the head "Profits and gains of business or profession'.

Clause (va) of the said sub-section provides for deduction of any sum received by the assessee from any of his employees to which the provisions of sub-clause (x) of clause (24) of section 2 apply, if such sum is credited by the assessee to the employee's account in the relevant fund or funds on or before the due date. Explanation to the said clause provides that, for the purposes of this clause, "due date" to mean the date by which the assessee is required as an employer to credit an employee's contribution to the employee's account in the relevant fund under any Act, rule, order or notification issued there-under or under any standing order, award, contract of service or otherwise.

Section 43B specifies the list of deductions that are admissible under the Act only upon their actual payment. Employer's contribution is covered in clause (b) of section 43B. According to it, if any sum towards employer's contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of the employees is actually paid by the assessee on or before the due date for furnishing the return of the income under sub-section (1) of section 139, assessee would be entitled to deduction under section 43B and such deduction would be admissible for the accounting year. This provision does not cover employee contribution referred to in clause (va) of sub-section (1) of section 36 of the Act.

Though section 43B of the Act covers only employer's contribution and does not cover employee contribution, some courts have applied the provision of section 43B on employee contribution as well. There is a distinction between contribution and employee's contribution towards welfare fund. It may be noted that employee's contribution towards welfare funds is a mechanism to ensure the compliance by the employers of the labour welfare laws. Hence, it needs to be stressed that the employer's contribution towards welfare funds such as ESI and PF needs to be clearly distinguished

from the employee's contribution towards welfare funds. Employee's contribution is employee own money and the employer deposits this contribution on behalf of the employee in fiduciary capacity. By late deposit of employee contribution, the employers get unjustly enriched by keeping the money belonging to the employees. Clause (va) of sub-section (1) of Section 36 of the Act was inserted to the Act vide Finance Act 1987 as a measures of penalizing employers who mis-utilize employee's contributions.

Accordingly, in order to provide certainty, it is proposed to –

(i) amend clause (va) of sub-section (1) of section 36 of the Act by inserting another explanation to the said clause to clarify that the provision of section 43B does not apply and deemed to never have been applied for the purposes of determining the ―due date‖ under this clause; and

(ii) amend section 43B of the Act by inserting Explanation 5 to the said section to clarify that the provisions of the said section do not apply and deemed to never have been applied to a sum received by the assessee from any of his employees to which provisions of sub-clause (x) of clause (24) of section 2 applies.

These amendments will take effect from 1st April, 2021 and will accordingly apply to the assessment year 2021-22 and subsequent assessment years. [Clauses 8 and 9]"

14. Therefore, the amended provisions of Section 43B as well as 36(1)(va) are not applicable for the assessment year under consideration. By following the binding decision of Hon'ble Jurisdictional High Court, the employees contribution paid by the assessee before the due date of filing of return of income u/s.139(1) is an allowable deduction. Accordingly, we

decide this issue in favour of the assessee and the disallowance made by the Assessing Officer is deleted.

15. In the result, the appeal of the Assessee is partly allowed.

Order pronounced in the open Court on 27th August, 2021.

Sd/-
[R.K. PANDA]
ACCOUNTANT MEMBER

Sd/-
[VIJAY PAL RAO]
JUDICIAL MEMBER

DATED: **27th August, 2021**

Prabhat: