

* **THE HIGH COURT OF DELHI AT NEW DELHI**

% Date of decision: 7th July, 2010

+ ITA No.794/2010

CIT Appellant
Through Ms. Suruchi Aggarwal, Adv.
versus

SPL INDUSTRIES LTD. Respondent
Through None.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE MANMOHAN

1. Whether reporters of the local papers be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in the Digest?

DIPAK MISRA, CJ (ORAL)

In this appeal preferred under Section 260A of the Income Tax Act, 1961 (for brevity 'the Act') the assail is to the order dated 5.11.2009 passed by the Income Tax Appellate Tribunal, Delhi (for short 'the tribunal') in ITA No. 3817/Del/2009 pertaining to the assessment year 2005-06.

2. The facts which are essential to be stated are that the respondent- assessee, which is engaged in the business of textiles processing, and manufacture and export of garments, filed its return for the assessment year 2005-06 declaring a total income of Rs.8,84,23,982/-. The case of the assessee was selected for scrutiny and notice under Section 143(2) was issued. In course of assessment, the assessing officer found that in Form No. 3CD the tax auditor had given and certified the details of contribution

deducted from the employees' salary towards the Provident Fund (PF) and the contribution under the Employees State Insurance (ESI). The assessee had not fulfilled its obligation of depositing the Provident Fund contribution deducted from the employees' salary as well as its own contribution within the due date as stipulated under the statute. The total of late deposit of PF and ESI contribution in respect of employee share was found to be to the tune of Rs.75,21,624/-. Considering the submissions put forth before the assessing officer, the said authority repelled the stand of the assessee that the payments were made within the grace period. He referred to Sections 43B, 36(1)(va) and 2(24)(x) of the Income Tax Act and Section 14B of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 and expressed the view that there had been late payment of employees' contribution towards PF and ESI an total addition of Rs.75,21,824/- and accordingly by order dated 26.12.2007 added the same to the taxable income. That apart charged interest under Section 234B and 234D of the Act and initiated a proceeding for penalty under Section 271(1)(c) of the Act.

3. Being dissatisfied with the aforesaid order, the assessee preferred an appeal before the CIT(A) who allowed the appeal of the assessee in part holding, inter alia, that the addition of Rs.31,97,525/- has paid during the grace period as regards the Provident Fund dues and a sum of Rs.27,18,354/- has pertaining to the contribution of the Employees State

Insurance had been paid within the period including the grace period and hence, the same deserved to be deleted.

4. Being grieved by the said order, the revenue preferred an appeal before the tribunal on the ground that the first appellate authority has deleted the addition made by the assessing officer without appreciating the provisions contained in Section 2(24)(x) read with Section 36(1)(va) of the Act. The tribunal concurred with the order passed by the CIT(A) and expressed the view as follows:

“4. We have carefully considered the submission of Id. DR. A finding has been recorded by Id. CIT(A) at page 4 that the contentions of the assessee have been examined with documentary evidence and provisions of the Act. She has further recorded out of addition of Rs.75,21,824/- a sum of Rs.72,46,570/- has been paid within due date ambit. No material has been brought on record to show that these findings of Id. CIT(A) are incorrect rather table reproduced in the assessment order clearly shows that all the payments have been made before the due date of filing the return. Hon’ble Delhi High Court in the case of CIT vs. P.M. Electronics Ltd., 313 ITR 161 (Del.) has held that if the payments are made before the due date of filing the return, no such disallowance can be made under Section 43B. Therefore, we find no infirmity in the order of CIT(A) vide which the relief has been given to assessee. We decline to interfere.”

5. Ms. Suruchi Aggarwal, learned counsel for the revenue submitted that the tribunal has fallen into error by placing reliance on the decision rendered in *CIT vs. P.M. Electronics Ltd., 313 ITR 161 (Del.)* wherein it has held that if the payments are made before the due date of filing the return, no such disallowance can be made under Section 43B of the Act is

not applicable to the case at hand inasmuch as the said decision had placed reliance on the decision of the Apex Court in the case of ***CIT vs. Vinay Cement Ltd., 2007 (213) CTR 268 = 2009 (313) ITR (SC)*** which only relates to the contribution made by the employer and would not cover the contribution made by the employees. In this context, we may profitably referred to the decision in ***Commissioner of Income Tax vs. AIMIL Limited in ITA No. 1063/2008*** whereby a Division Bench of this Court was dealing with the issue whether the tribunal was correct in law deleting the addition relating to employees' contribution towards the Provident Fund and the Employees State Insurance contribution made by the assessing officer under Section 36(1)(va) of the Act. The Division Bench, as is evident from the order, referred to the clause (v) of sub-section (1) of Section 36 and thereafter to clause (va) of the same and scanned the anatomy of 43B and referred to the decision in ***Vinay Cement Ltd.*** (supra) and relied on the decision in ***P.M. Electronics Ltd.***(supra) wherein the substantial questions of law were framed, inter alia, whether the 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 and proceeded to hold as follows:

“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 principles laid down by the Supreme Court in *Vinay Cement* (supra).”

6. Be it noted, the decision rendered by the Gauhati High Court was assailed before the Apex Court in *Vinay Cement Ltd.* (supra). In the said case, their Lordships have held thus:

“In the present case we are concerned with the law as it stood prior to the amendment of Section 43B. In the circumstances the assessee was entitled to claim the benefit in Section 43B for that period particularly in view of the fact that he has contributed to provident fund before filing of the return.

The special leave petition is dismissed.”

7. It is apt to note that the Division Bench has taken note of the submission advanced by the revenue that the distinction between employers’ contribution on the one hand and the employees’ contribution on the other. On the foundation that when employees’ contribution was recovered from their salaries / wages that is the trust money in the hands of the assessee and, therefore, recourse of law providing for treating the same as income that the assessee received as the employees’ contribution would only enable the assessee to claim deduction only on actual payment made by due date specified under the provisions of the Act. The Bench while dealing with the same has opined thus:

“11. Before we delve into this discussion, we may take note of some more provisions of the Act. Section 2(24) of the Act enumerates different components of income. It, inter alia, stipulates that income includes any sum received by the assessee from his employees as contributions to any provident fund or superannuation fund or any fund set up under the provisions of the Employees’ State Insurance Act, 1948 (34 of 1948), or any other fund for the welfare of such employees. It is clear from the above that as soon as employees contribution towards provident fund or ESI is received by the assessee by way of deduction or otherwise from the salary / wages of the employees, it will be treated as ‘income’ at the hands of the assessee. It clearly follows therefrom that if the assessee does not deposit this contribution with provident fund/ESI authorities, it will be taxed as income at the hands of the assessee. However, on making deposit with the concerned authorities, the assessee becomes entitled to deduction under the provisions of Section 36(1)(va) of the Act. Section 43B(b), however, stipulates that such deduction would be permissible only on actual payment. This is the scheme of the Act for making an assessee entitled to get deduction from income insofar as employees’ contribution is concerned. It is in this backdrop we have to determine as to at what point of time this payment is to be actually made.”

8. Upon perusal of the aforesaid, we are of the considered opinion that the decisions rendered in *P.M. Electronics Ltd.*(supra) and *AIMIL Limited* (supra) have correctly laid down the law and there is no justification or reason to differ with the same. In the result, we do not perceive any merit in this appeal and accordingly the same stands dismissed.

CHIEF JUSTICE

MANMOHAN, J

JULY 07, 2010

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