

OD-18

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (INCOME TAX)
ORIGINAL SIDE

ITAT/185/2024
IA NO : GA/1/2024
PRINCIPAL COMMISSIONER OF INCOME TAX-9, KOLKATA
VS
MR. ALTABUR RAHAMAN MOLLAH

BEFORE :
THE HON'BLE THE CHIEF JUSTICE T.S. SIVAGNANAM
And
THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA
Date : 8th November, 2024

Appearance :
Ms. Smita Das De, Adv.
...for appellant

The Court : This appeal has been filed by the revenue under Section 260A of the Income Tax Act, 1961 (the Act) challenging the order dated 29th November, 2023, passed by the Income Tax Appellate Tribunal, "A" Bench, Kolkata (Tribunal) in I.T.A No.232/Kol/2022, for the assessment order 2017-18.

The revenue has raised the following substantial questions of law for consideration:-

- i) Whether on the facts and in the circumstances of the case the Tribunal was justified in law in dismissing the Miscellaneous Petition of the Department, on grounds that there is no power conferred on them to condone delays under section 254 of the Income Tax Act, The Hon'ble ITAT, Kolkata denied substantial justice to the Department ?

- ii) Whether on the facts and in the circumstances of the case the Tribunal was justified in law in not rectifying the order passed earlier in favour of the assessee suo-moto, in view of the observations of the Hon'ble Supreme Court in the case of Checkmate Services Pvt. Ltd. vs. Pr. CIT-1, reported in (2022) 143 taxmann.com 178(SC) (2003) 290 taxmann 19 (SC)/(2022) 448 ITR 518 (SC) wherein by order dated 12th October, 2022, the Hon'ble apex court decided that employee's contribution of EPF and ESI is income at the hand of assessee employer and if not deposited to govt. account as per the provisions of respective Act, it is not allowable as business expenditure ?

We have heard Ms. Smita Das De, learned standing counsel appearing for the appellant.

The notice sent to the respondent/assessee has returned with the remark "Endorsement Left". Considering the narrow scope of this appeal, the same is taken up for decision.

Learned Tribunal has dismissed the Miscellaneous Application filed by the revenue in M.A. No.35/Kol/2023 under Section 254 of the Act on the ground that it is barred by time. The finding rendered by the Tribunal cannot be faulted since the Miscellaneous application filed by the revenue was well beyond the time-limit prescribed under sub-section(2) of Section 254 of the Act. Therefore, there is no ground made out for interfering with the order passed by the Tribunal. Furthermore, we note that in the order dated 5th September,

2022 the Tribunal while allowing the appeal set aside the order passed by the Assessing Officer under Section 263 of the Act. However, after setting aside the said order, the learned Tribunal has observed that once a fact was brought to the notice of the Commissioner of Income Tax (Appeal) [CIT(A)], he should have got it verified from the Assessing Officer before relying on a finding that the assessment is erroneous as much as prejudicial to the interest of the revenue. The learned Tribunal found that the order of the CIT(A) is totally silent on this aspect and therefore the appeal filed by the assessee was allowed for statistical purpose and this issue was remanded to the CIT(A) with a direction that a remand report be called for from the Assessing Officer and file proof that all these payments have been made before the due date for filing of the return, then notice under Section 263 of the Act will be dropped.

It has to be noted that the learned Tribunal had allowed the appeal filed by the assessee and remanded the matter back to the CIT(A) by taking note of the decision of this Court in the case of M/s. Philip Carbon Black Limited and M/s. Coal India Limited. However, the said decision is no longer good law.

In the light of the decision of the Hon'ble Supreme Court of India in Checkmate Services (P.) Ltd. vs. CIT (2022) 143 taxmann.com 178 (SC), wherein it was held that for the assessment years prior to 2021-22, non-obstante clause under Section 43B could not apply in case of amounts which were held in trust as was case of employees' contribution which were deducted from their income and was held in trust by the assessee-employer as per Section 2(24)(x), thus, said clause would not absolve the assessee-employer

from its liability to deposit employees' contribution on or before due date as a condition for deduction.

Thus, it goes without saying that in the remand proceedings the CIT(A) has to take note of the decision of the Supreme Court in Checkmate Services (P.) Ltd. (supra) as also the Assessing Officer while submitting a remand report.

With this observation, the appeal stands disposed of.

Consequently, the substantial questions of law are left open.

The application IA No: GA/1/2024 is also disposed of.

(T.S. SIVAGNANAM, C.J.)

(HIRANMAY BHATTACHARYYA, J.)