



\* **HIGH COURT OF DELHI : NEW DELHI**

+ **ITA No. 475/2007**

% **Judgment reserved on: 23.09.2008**  
**Judgment delivered on:03.11.2008**

**THE COMMISSIONER OF INCOME TAX-V ..... APPELLANT**  
**Through : Ms Rashmi Chopra, Advocate**

**versus**

**P M ELECTRONICS LTD ..... Respondent**  
**Through : Mr Prakash Kumar, Advocate**

**CORAM :**

**HON'BLE MR JUSTICE BADAR DURREZ AHMED**  
**HON'BLE MR JUSTICE RAJIV SHAKDHER**

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| 1. Whether the Reporters of local papers may be allowed to see the judgment ? | Yes |
| 2. To be referred to Reporters or not ?                                       | Yes |
| 3. Whether the judgment should be reported in the Digest ?                    | Yes |

**RAJIV SHAKDHER, J.**

1. This is an appeal under Section 260A of the Income Tax Act, 1961 (hereinafter referred to in short as the Act) against judgment dated 12.8.2005 in ITA No 1585/Del/2002 in respect of the assessment year 1998-99. The only issue which arises for consideration is the allowability of deduction under Section 36(1)(5a) read with Section 2(24)(x) and Section 43(B) to the assessee in respect of employer/employees contributions towards provident fund payments which were made after the due date prescribed under the Employees



Provident Fund Act and the Rules made thereunder before the due date of furnishing the return of income under sub-Section 1 of Section 139.

2. The Revenue being aggrieved by the impugned judgment on account of the fact that the Tribunal, based on its own decision in the case of ACIT v. M/s Vistas RRB (India) Ltd.: (2005)92 ITD 1 Delhi, has taken the view that the amendment brought about in Section 43B by virtue of Finance Act, 2003 was curative in nature and hence applicable retrospectively. In other words, the Tribunal held that the assessee would be eligible for deduction in respect of such payments made before the due date of filing of return. The Revenue has contested this position before us. Towards this end, the Revenue has proposed the following questions of law which according to them are substantial questions of law:-

- “(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 2<sup>nd</sup> Proviso to Section 43 by way of amendment by the Finance Act 2003 is retrospective in nature?”

3. In order to adjudicate upon the present appeal, the following facts require to be noted:-

4. On 27.11.98 the assessee had filed a return of income declaring a loss of Rs 8,92,888/-. On 11.5.99 the return was processed under Section 143(1)(A) of the Act. The case of the assessee was selected for scrutiny. Accordingly, a



notice dated 27.9.99 under Section 143(2) of the Act was issued to the assessee

In response to the notice and on examination of the details submitted by the assessee with respect to provident fund payments made both on account of employer's and employees' share revealed that payments in the sum of Rs 17,94,042/- were late as per the provisions of Section 36(1)(5A) read with Section 2(24)(x) and Section 43B. Consequently, the Assessing Officer disallowed the deduction and added a sum of Rs 17,94,042/- towards EPF contribution.

5. Being aggrieved, the assessee filed an appeal before the Commissioner of Income Tax (Appeals) [hereinafter referred to in short as the 'CIT(A)']. The CIT(A) after considering the matter while accepting the view of the Assessing Officer on the interpretation of the relevant provisions of the Act on facts directed the deletion of an addition of Rs 4,83,251 being payments made towards provident fund in respect of December, 1997, January, 1998 and February, 1998 on the ground that they were within the time prescribed under the relevant provisions of the Act. As a result, the CIT(A) confirmed the addition to the income of the assessee only a sum of Rs 13,10,791/- as against Rs 17,94,042/- added by the Assessing Officer.

6. The assessee being aggrieved preferred an appeal to the Tribunal. The Tribunal, as indicated hereinabove, allowed the appeal of the assessee.



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 A 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., giv 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 :  
substantial question of law arises for our consideration in the present appeal.  
The appeal is, thus, dismissed.

**RAJIV SHAKDHER, J**

**BADAR DURREZ AHMED, J**

**November 03, 2008**  
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