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* IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ ITA No. 1063 of 2006
ITA No.755 of 2008
ITA No. 204 of 2009
ITA No. 1214/2008 with ITA No. 1246/2008
ITA No. 50/2009
ITA No. 78/2009

% *Reserved on: December 04, 2009*
Pronounced on: December 23, 2009

1. ITA No. 1063/2008

Commissioner of Income Tax . . . Appellant

through : Ms. Prem Lata Bansal with
Mr. Paras Chaudhry, Advocates

VERSUS

AIMIL Limited . . . Respondent

through : Dr. Rakesh Gupta with
Ms. Poonam Ahuja, Advocates

2. ITA No. 1214/2008

Nirmala Swami . . . Appellant

through : Mr. Satyen Sethi with
Mr. Johnson Bara, Advocates

VERSUS

Commissioner of Income Tax, Delhi - VIII . . . Respondent

through : Ms. Rashmi Chopra, Advocate

3. ITA No. 755/2008

Spearhead Digital Studio P. Ltd. . . . Appellant

through : Mr. Prakash Kumar, Advocate

VERSUS

Commissioner of Income Tax . . . Respondent

4. **ITA No. 204/2009**

Commissioner of Income Tax, Delhi-V . . . Appellant

through : Mr. N.P. Sahni, Advocate

VERSUS

M/s. Net 4 India Ltd. . . . Respondent

through : Dr. Rakesh Gupta with Ms. Poonam Ahuja, Advocates

5. **ITA No. 50/2009**

Commissioner of Income Tax-II . . . Appellant

through : Mr. Sanjeev Sabharwal, Advocate

VERSUS

Modipon Ltd. . . . Respondent

through : Mr. Prakash Kumar, Advocate

6. **ITA No. 78/2009**

Commissioner of Income Tax-II . . . Appellant

through : Mr. Sanjeev Sabharwal, Advocate

VERSUS

Modipon Ltd. . . . Respondent

through : Mr. Prakash Kumar, Advocate

7. **ITA No. 1246/2008**

M/s. Ekta Agro Industries Ltd. . . . Appellant

through : NEMO

VERSUS

Income Tax Officer, Ward 11(1) . . . Respondent

through : NEMO

CORAM :-
THE HON'BLE MR. JUSTICE A.K. SIKRI
THE HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

1. Whether Reporters of Local newspapers may 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?

A.K. SIKRI, J.

1. Though the assessees are different in these appeals, the aforesaid question is common in all these cases, which falls for consideration in almost identical factual backdrop. In fact, it is a matter of pure interpretation of the provisions of the Income Tax Act, 1961 (for short, the 'Act'), particularly Section 36(1)(va) of the Act. However, in order to understand the implication, it would be necessary to take note of facts of one appeal. We, accordingly, are stating the facts as they appear in ITA No. 1063/2008.

2. The case relates to the assessment year 2002-03. The respondent assessee had filed its return on 30.10.2002 declaring income at Rs.7,95,430/-. During the assessment proceedings, the Assessing Officer (AO) found that the assessee had deposited employers' contribution as well as employees' contribution towards provident fund and ESI after the due date, as prescribed under the relevant Act/Rules. Accordingly, he made addition of Rs.42,58,574/- being employees' contribution under Section 36(1)(va) of the Act and Rs.30,68,583/- being employers' contribution under Section 43B of the Act. Felt aggrieved by this assessment order, the assessee

orders dated 15.7.2005. Though the CIT(A) accepted the cor of the assessee that if the payment is made before the due date of filing of return, no disallowance could be made in view of the provisions of Section 43B, as amended vide Finance Act, 2003, he still confirmed the addition made by the AO on the ground that no documentary proof was given to support that payment was in fact made by the assessee. The assessee filed an application under Section 154 of the Act before the CIT(A) for rectification of the mistake. After having satisfied that payment had, in fact, been made, the CIT(A) rectified the mistake and deleted the addition by holding that the assessee had made the payment before the due date of filing of the return, which was a fact apparent from the record.

3. It was now the turn of the Revenue to feel agitated by these orders and, therefore, the Revenue approached the Income Tax Appellate Tribunal (ITAT) challenging the orders of the CIT(A). The department has, however, remained unsuccessful as the appeal preferred by the department is dismissed by the ITAT vide its impugned decision dated 31.12.2007, which is the subject matter of appeal before us.

Perusal of the order of the Tribunal would show that it has relied upon the judgment of the Supreme Court in the case of ***CIT*** v. ***Vinay Cement Ltd.***, 213 CTR 268, to support its decision to the effect that if the employers' as well as employees' contribution towards provident fund and ESI is paid before the due date of filing of return,

4. In some other appeals preferred by the assessees, the ITAT ha contrary view and upheld the addition made by the AOs. Under these circumstances, all these appeals were admitted and heard on the following question of law :-

> "Whether the ITAT was correct in law in deleting the addition relating to employees' contribution towards Provident Fund and ESI made by the Assessing Officer under Section 36(1)(va) of the Income Tax Act, 1961?"

5. Section 36 of the Act deals with certain deductions which shall be allowed in respect of matters dealt with therein, in computing the income referred to in Section 28 of the Act. Different types of deductions are provided therein in various clauses of Section 36. Clause (iv) of sub-section (1) deals with deductions on account of contribution towards a recognized provident fund or an approved superannuation fund made by the assessee as an employer, subject to certain limits and also subject to certain conditions as the CBDT may think fit to specify. Clause (v) of sub-section (1) of Section 36 enables the assessee to seek deduction in respect of sum paid by it as an employer by way of contribution towards an approved gratuity fund created by him for the exclusive benefit of his employees under an irrevocable trust. Then comes clause (va) which deals about employees' contribution in the provident fund and ESI and reads as under :-

> "(va) 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

Explanation – For the purposes of this clause, "due da means the date by which the assessee is required as employer to credit an employee's contribution to ... employee's account in the relevant fund under any Act, rule, order or notification issued thereunder or under any standing order, award, contract or service or otherwise;"

6. It would also be appropriate to take note of Section 43B of the Act primarily for the reason that in ***Vinay Cement*** (supra) it was this provision which came up for discussion before the Supreme Court and also keeping in view the contention of learned counsel for the Revenue that this judgment would be of no avail to the assessee while discussing the matter under Section 36(1)(va) of the Act. Section 43B stipulates that certain deductions are to be given only on actual payment. Clause (b) thereof talks about contribution by the assessee as employer to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of the employees. Since we are concerned only with clause (b), we reproduce the same for clearer understanding :-

> "**43B.** Notwithstanding anything contained in any other provision of this Act, a deduction otherwise allowable under this Act in respect of –
>
> xx xx xx
>
> (b) any sum payable by the assessee as an employer by way of contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of employees, (or),
>
> xx xx xx
>
> shall be allowed irrespective of the previous year in which the liability to pay such sum was incurred by the assessee according to the method of accounting regularly employed by him only in computing the income referred to in section 28 of that previous year in which such sum is actually paid by him :

> **Provided** that nothing contained in this section shall apply in relation to any sum which is actually paid by the assessee on or before the due date applicable in his case for furnishing the return of income under sub-section (1) of section 139 in respect of the previous year in which the liability to pay such sum was incurred as aforesaid and the evidence of such payment is furnished by the assessee along with such return."

7. During the period in question with which we are concerned, Section 43B contained second proviso also, which stands omitted by the Finance Act, 2003 with effect from 1.4.2004. Since, this provision existed at the relevant time, it also needs to be reproduced :-

> "**Provided further** that no deduction shall, in respect of any sum referred to in clause (b), be allowed unless such sum has actually been paid in cash or by issue of a cheque or draft or by any other mode on or before the due date as defined in the *Explanation* below clause (va) of sub-section (1) of section 36, and where such payment has been made otherwise than in cash, the sum has been realized within fifteen days from the due date."

8. As per the first proviso, if the payment is actually made on or before the due date applicable in his case for filing the return, it would be admissible as deduction. Thus, the *'due date'* is the date on which return is to be filed. The case of the Revenue is that for employees' contribution, the 2nd proviso was specifically incorporated and in the present case, as we are concerned with non-deposit of the employees' contribution towards provident fund as well as ESI contribution by the employer, only 2nd proviso be looked into.

9. What is sought to be argued is that distinction is to be made while treating the case related to employers' contribution on the one hand and employees' contribution on the other hand. It was submitted

salaries/wages, that is trust money in the hands of the assesse[e]. For this reason, rigors of law are provided by treating it as income when the assessee receives the employees' contribution and enabling the assessee to claim deduction only on actual payment by due date specified under the provisions.

10. Ms. Prem Lata Bansal, learned counsel for the Revenue, thus, argued that the second proviso to Section 43B, as it stood at the relevant time, clearly mentioned that deduction in respect of any sum referred to in clause (b) shall not be allowed unless such sum has actually been paid in cash or by issuance of cheque or draft or by any other mode on or before the due date, as defined in the explanation below clause (va) of sub-section (1) of Section 36. Thus, the assessee would earn the entitlement only if the actual payment is made before the due date specified in explanation below clause (va) of sub-section (1) of Section 36 of the Act. As per the said explanation, *'due date'* means the date by which the assessee is required, as an employer, to credit the employees' contribution to the employees account in the relevant fund under any Act, rules, order or notification issued thereunder or under any standing order award contract of service or otherwise.

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

to any provident fund or superannuation fund or any fund 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.

12. Since the ITAT while holding that the amount would qualify for deduction even if paid after the due dates prescribed under the Provident Fund/ESI Act but before the filing of the income tax returns by placing reliance upon the Supreme Court judgment in ***Vinay Cement*** (supra), at this juncture we take note of the discussion of ITAT on this aspect :-

AO has categorically stated that what the amount due was which month in respect of EPF, Family Pension, PF inspecti charges and ESI deposits and what were the due dates for th... deposits and on which date these deposits were made. The dates of deposits are mentioned between 23rd May 2001 to 23rd April 2002. The latest payment is made on 23rd April 2002 and assessee being limited company had filed its return on 20th October, 2002 which is a date not beyond the due date of filing of the return. Thus, it is clear beyond doubt that all the payments which have been disallowed were made much earlier to the due date of filing of the return. The disallowance is not made by the AO on the ground that there is no proof of making such payment but disallowance is made only on the ground that these payments have been made beyond the due dates of making these payments under the respective statute. Thus, it was not an issue that the payments were not made by the assessee on the dates which have been stated to be the dates of deposits in the assessment order. If such is a factual aspect then according to latest position of law clarified by Hon'ble Supreme Court in the case of CIT Vs Vinay Cement Ltd. that no disallowance could be made if the payments are made before the due date of filing the return of income. This issue came before Hon'ble Supreme Court in the case of CIT Vs. Vinay Cement Ltd. which was a special leave petition filed by the department against the High Court Order of 26th June, 2006 in ITA No. 2/05 and ITA No. 56/03 and ITA No. 80/03 of the High Court of Guwahati, Assam and it is order dated 7th March, 2007. A copy of the said order is placed on record. The observations of their Lordships on the issue are as under :-

> "In the present case we are concerned with the law as it stood prior to the amendment of Sec. 43B. In the circumstances the assessee was entitled to claim the benefit in Sec. 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."

13. It is clear from the above that in ***Vinay Cement*** (supra), the SLP preferred by the Revenue against the judgment of the Guwahati High Court was dismissed making the aforequoted observations. The reasons are given and, thus, it amounts to affirmation of the view taken by the High Court of Guwahati.

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14. When we keep that proposition in mind and also tal 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

(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

CIT v. Nexus Computer (P) Ltd by a judgment dated 18.8 passed in *Tax Case (A) No. 1192/2008* discussed the impact 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)*.

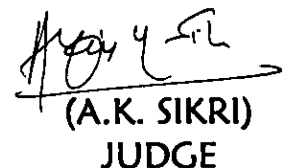
14. In these circumstances indicated above, we are of the opinion that no substantial question of law arises for our consideration in the present appeal. The appeal is, thus, dismissed."

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

17. 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).

18. 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.

No costs.



(A.K. SIKRI)
JUDGE

(SIDDHARTH MRIDUL)
JUDGE

December 23, 2009
nsk