IN THE INCOME TAX APPELLATE TRIBUNAL

"C" BENCH, MUMBAI

BEFORE SHRI J. SUDHAKAR REDDY, ACCOUNTANT MEMBER, AND

SHRI R.S. PADVEKAR, JUDICIAL MEMBER

ITA no. 3236, 3237, 3239/Mum./2011
(Assessment Years : 2004-05, 2005-06, 2003-04)

Pan India Paryatan Ltd.
(Now Essel Infra Projects Ltd.)
Continental Building,
135, Dr. Annie Besant Road, Worli,
Mumbai 400 018
PAN – AAACP6095M ………………… Appellant

v/s

Asstt. Commissioner of Income Tax
Circle-7(1), Mumbai ………………. Respondent

Assessee by : Mr. Rajesh Chamaria
Revenue by : Mr. Atiq Ahmad

Date of Hearing – 20.02.2012	Date of Order – 29.02.2012

O R D E R

PER J. SUDHAKAR REDDY, A.M.

These appeals preferred by the assessee, are directed against separate but identical impugned orders dated 17th May 2010, passed by the Commissioner (Appeals)-XIII, Mumbai, for assessment years 2003-04, 2004-05 and 2005-06 respectively. Since the issues arising out of the grounds raised in all the years under appeal being common, for the sake of convenience, these appeals were heard together and are being disposed off by way of this consolidated order.

2. The first common issue that arose in all the years under appeal, except variation in figures, is whether or not the first appellate authority was justified in upholding the addition made by the Assessing Officer on account of delayed payments of employee's contribution to ESIC and MLWF.

3. We have heard the learned Counsel, Mr. Rajesh Chamaria, representing the assessee and the learned Departmental Representative, Mr. Atiq Ahmad, representing the Revenue. On a careful consideration of the facts and circumstances of the case and on a perusal of the papers on record, as well as the case laws cited before us, we find that the issue for our adjudication is covered in favour of the assessee by the judgment of Hon'ble Delhi High Court in CIT v/s Aimil Limited & Ors., Income Tax Appeal no.1063 of 2006, etc., judgment dated 23rd December 2009, wherein Their Lordships have held as follows:-

> *"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."*

4. In an order dated 28th January 2010, passed by the Tribunal in ITA no.6847/Mum./2008, for assessment year 2005-06, in Pink Pen Private Ltd. v/s ITO, the Tribunal was dealing with the employees' contribution to Provident Fund and ESIC which was paid even beyond the grace period. The Assessing Officer had disallowed the payment under section 36(1)(va),

holding that the contribution was not covered by section 43B. The Tribunal was of the opinion that the case was covered by the judgment of the Supreme Court in CIT v/s Alom Extrusions Ltd. [2009] 319 ITR 306 (SC) and, accordingly, held that the contribution of the employees' if paid before the due date for filing the return of income, as contemplated by the proviso to section 43B of the Act, is to be allowed as a deduction. In the present case, admittedly, the assessee paid the employees' contribution within the grace period and before filing the return of income. Since the present issue is covered in favour of the assessee by the judgment of the Hon'ble Delhi High Court and the decision of the Tribunal cited supra, we set aside the impugned orders passed by the Commissioner (Appeals) for all the years under appeal and hold that the authorities below ought to have allowed the claim of the assessee. Ground no.1, in all the appeals are allowed.

5. The second common issue that arose in all the years under appeal, except variation in figures, relates to disallowance under section 14A of the Act. The first appellate authority directed the Assessing Officer to apply Rule 8D for making disallowance under section 14A.

6. Before us, the learned Counsel for the assessee submitted that he did not wish to press this ground. Learned Departmental Representative did not object to the submissions of the learned Counsel. Consequently, the ground raised by the assessee is dismissed as *"not pressed"*.

7. In the result, assessee's appeal is partly allowed.

Order pronounced in the open Court on 29th February 2012

Sd/-	Sd/-
R.S. PADVEKAR	**J. SUDHAKAR REDDY**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

MUMBAI, DATED: 29th February 2012

Copy to:

(1) The Assessee;

(2) The Respondent;

(3) The CIT(A), Mumbai, concerned;

(4) The CIT, Mumbai City concerned;

(5) The DR, "C" Bench, ITAT, Mumbai.

TRUE COPY
BY ORDER

Pradeep J. Chowdhury
Sr. Private Secretary

ASSISTANT REGISTRAR
ITAT, MUMBAI BENCHES, MUMBAI