IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH **'E'** : MUMBAI

BEFORE SHRI D.K. AGARWAL, (JM) AND SHRI R.K. PANDA,(AM)

ITA No.5919/Mum/2009
Assessment Year : 2006-07

Texport Syndicate (I) Ltd.
Plot No.6, F-11/12
Seepz, Central Road
MIDC, Andheri (E)
Mumbai-93. …..(*Appellant*)
P.A. No.**(AACCT 2980 M)**

Vs.

Dy. Commissioner of Income tax
Range-8(3)
Aayakar Bhavan
Mumbai-20. …..(*Respondent*)

Appellant by : Shri M.M. Chaturvedi
Respondent by : Shri Hemant Lal

O R D E R

Per D.K. AGARWAL (JM).

This appeal preferred by the assessee is directed against the order dated 18.8.2009 passed by the ld. CIT(A) for the Assessment Year 2006-07.

2. Briefly stated facts of the case are that the assessee company is engaged in the business of manufacturing and export of readymade garments, filed return declaring total income of Rs.4,48,39,478/-. During the course of assessment proceeding the Assessing Officer on examination of P&L account observed that the assessee has received dividend income of Rs.71,634/- during the year. The assessee has claimed the same as exempt u/s.10(33) of the Income tax Act,

1961(the Act). The Assessing Officer further observed that the assessee has not attributed any expenses which have been incurred to earn the exempt income, though it is an accepted fact that for earning any income, some kind of expenditure necessarily has to be incurred. The Assessing Officer after relying on the decision of the Special Bench of the Tribunal in Daga Capital and Management Pvt. Ltd. (117 ITD 169)(Mum)(SB) worked the total disallowance u/s.14A read with Rule 8D amounting to Rs.1,90,166/- as per calculation appearing at page-3 of assessment order and added to the income of the assessee. Apart from this the Assessing Officer also observed that the assessee has made belated payment of employees contribution to PF. The Assessing Officer after giving the details of such payments at page 4 to 8 of the assessment order and after considering the assessee's explanation was of the view that the belated payment of employees contribution to PF and ESIC amounting to Rs.1,42,75,654/- and Rs.8,30,657/- totalling to Rs.1,51,06,311/- is not allowable and hence he treated the same as income of the assessee under sec.36(1)(va) r.w.s. 2(24)(x) of the Act. The Assessing Officer after making some other disallowances completed the assessment at an income of Rs.59429190/- vide order dated 24.12.2008 passed u/s.143(3) of the Act. On appeal, the ld. CIT(A) for the same reasons, while upholding the disallowance u/s.14A confirmed the disallowance of ESIC Rs.8,30,657/- on the ground that there is no grace period available for ESIC and the late payment of PF beyond the grace period, directed the Assessing Officer to delete the addition made on account of employees contribution to PF within the grace period after due verification and accordingly partly allowed the appeal.

3. Being aggrieved by the order of the ld. CIT(A) the assessee is in appeal before us.

4. Ground No.1 is against the sustenance of disallowance of Rs.1,90,166/- u/s.14A of the Act.

5. At the time of hearing both parties have agreed that this issue stands covered by the judgment of Hon'ble Jurisdictional High Court in Godrej & Boyce Mfg. Co. Ltd., vs. DCIT, therefore, the issue may be decided accordingly.

6. Having carefully heard the submissions of the rival parties and perusing the material available on record, we find merit in plea of the parties that the issue stands covered by the recent judgment of the Hon'ble Jurisdictional High Court in Godrej & Boyce Mfg. Co. Ltd. vs. DCIT in Income tax Appeal No.626 of 2010 and Writ Petition No.758 of 2010 dated 12.8.2010 wherein Their Lordships after considering the decision of the Tribunal in Daga Capital Management Pvt. Ltd. (117 ITD 169 (Mum)(SB), while holding that the provisions of sub sections (2) and (3) of sec.14A of the Act are constitutionally valid have held vide para-74 (vi) of the judgment as under :

> "74(vi) Even prior to Assessment Year 2008-09, when Rule 8D was not applicable, the Assessing Officer has to enforce the provisions of sub section (1) of section 14A. For that purpose, the Assessing Officer is duty bound to determine the expenditure which has been incurred in relation to income which does not form part of the total income under the Act. The Assessing Officer must adopt a reasonable basis or method consistent with all the relevant facts and circumstances after furnishing a reasonable opportunity to the assessee to place all germane material on the record;"

Respectfully following the above judgment we set aside the orders passed by the revenue authorities on this account and send back the matter to the file of the Assessing Officer who shall decide the same afresh in the light of the directions of the Hon'ble Jurisdictional High Court in the above cited case after providing reasonable opportunity of being heard to the assessee and accordingly the grounds taken by the assessee are partly allowed for statistical purposes.

7. Ground No.2 is against the sustenance of disallowance of Rs.4,15,125/- on account of employees contribution to ESIC, and

8. Ground No.3, as an additional ground, is against the sustenance of disallowance of employees contribution to PF deposited even after due date but before the due date of filing the return.

9. After hearing the rival parties and perusing the material available on record we are of the opinion that the issue involved in the present case is no more res integra and is covered by the decision of the Hon’ble Supreme Court in CIT vs. Alom Extrusions Ltd. (2009) 319 ITR 306 (SC), wherein Their Lordships have considered the applicability of section 36(1)(va) read with section 2(24)(x) as well as 43B of the Act and it has been held that the amendment was curative in nature and applicable retrospectively with effect from April 1, 1988.

10. In CIT vs. AIMIL Ltd. (2010) 321 ITR 508 (Del.) Their Lordships while observing that the assessee has deposited employer’s contribution as well as employees’ contribution towards PF and ESIC after the due date, as prescribed under the relevant Act/Rule but before the due date for filing the return under the Income tax Act have held that no disallowance could be made in view of the provisions of sec.43B as amended by the Finance Act, 2003.

11. In view of the above legal position and in absence of any contrary material placed on record by the revenue we are of the view that the payments of PF and ESIC made by the assessee after the due date as prescribed under the relevant Act/Rule but before the due date of filing of return under the Income tax Act are allowable and accordingly we direct the Assessing Officer to allow the same after due verification. The grounds taken by the assessee are, therefore, allowed.

12. In the result, assessee's appeal stands partly allowed for statistical purposes.

Order pronounced in the open court on 12.11.2010.

Sd/-	**Sd/-**
(R.K. PANDA)	**(D.K. AGARWAL)**
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Mumbai, Dated: 12.11.2010.
Jv.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT(A) Concerned, Mumbai
The DR " " Bench

True Copy

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.