आयकर अपीलीय अधिकरण "आई" न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL "I" BENCH, MUMBAI

श्री संजय अरोड़ा, लेखा सदस्य **एवं** श्री विवेक वर्मा, न्यायिक सदस्य के समक्ष ।
BEFORE SHRI SANJAY ARORA, AM AND SHRI VIVEK VARMA, JM

विविध आवेदन सं./I.T.A. No. 5487/Mum/2012

(**निर्धारण वर्ष /** Assessment Year: 2008-09)

ITO-3(2)(1) Room No. 673, 6th floor, Aayakar Bhavan, M. K. Road, Mumbai -400 020	**बनाम**/ Vs.	Indore Steel and Iron Mills Ltd., 71, Empire Building, 34, D.N. Road, Mumbai -400 001
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AAACI 6050 K		
(अपीलार्थी /**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

अपीलार्थी ओर से / **Appellant by**	:	Shri Sacchidanand Dubey
प्रत्यर्थी की ओर से/**Respondent by**	:	Shri Shiv Prakash

सुनवाई की तारीख / **Date of Hearing**	:	03.12.2014
Date of Order	:	08.12.2014

आदेश / O R D E R

Per Sanjay Arora, A. M.:

This is an Appeal by the Revenue arising out of the Order by the Commissioner of Income Tax (Appeals)-4, Mumbai ('CIT(A)' for short) dated 06.06.2012, allowing the assessee's appeal contesting its assessment u/s.143(3) of the Income Tax Act, 1961 ('the Act' hereinafter) for the assessment year (A.Y.) 2008-09 vide order dated 24.12.2010.

2. The only issue arising in this appeal is whether the deposit by the assessee-company of the employee's contribution to the Employees Provident Fund (EPF) or to the Employees State Insurance Corporation (ESIC), i.e., as an employer, after the respective due dates, i.e., under the respective Acts, where-under both the employee and the employer are obliged to contribute a sum, reckoned as a percentage of an employee's

salary, to a Fund maintained for the welfare of the employees, though before the due date of filing return of income for the relevant year, could be allowed as a deduction in computing its business income for the said year. The first appellant authority having allowed the assessee's appeal on the short ground of the said deduction being covered by the amended u/s.43B, which has rather been explained by the apex court in *CIT v. Alom Extrusions Ltd*. [2009] 319 ITR 306 (SC) to be retrospective, the Revenue is in appeal.

3. We have heard both the parties and relevant material on record.

The primary issue arising in the instant case, as discerned from the orders of the authorities below; the ground/s of appeal assumed by the assessee (before the ld. CIT(A)) and the Revenue (before us), and the arguments before us, is the provision/s under which the relevant payment stands to be governed. The Revenue relies on the decision in the case of *Bengal Chemical and Pharmaceuticals Ltd*. [2011]11 taxmann.com 328/10 taxmann.com 26) (Kol), holding that the employee's contribution to the said employee welfare funds is covered by section 36(1)(va) read with section 2(24)(x) of the Act. As such, the provision of s. 36(1)(va), which provides for the deduction of the said sum/s to be subject to payment by the due date of deposit under the relevant statute, shall prevail. The said issue has in fact been the subject matter of consideration by the special bench of the Tribunal in *CIT v. ITC Ltd*. [2008] 112 ITD 57 (Kol)(SB), holding likewise (paras 55-56/pgs.102-104). There was, therefore, it stands explained, no question of applicability of section 43B to such sums. The matter stands discussed again *in extenso* by the tribunal per its decision in the case of *ITO v. LKP Securities Ltd*. [2013] 36 CCH 093 (Mum)[in ITA Nos. 638 & 1093/Mum/2012 dated 17.05.2013]. Even if, it stands explained therein, s. 43B is considered as applicable, being a *non obstante* clause, it would come into play only where the relevant payment/s is otherwise allowable, i.e., under any other provision of the Act, being a condition precedent for the applicability of section 43B. The same being not deductible under the relevant provision, i.e., section 36(1)(va) r/w s. 2(24)(x), no occasion for invocation of section 43B arises. In other words, even assuming section 43B to be applicable to the employee's contribution to the said funds would be of little

moment. This is as section 43B stipulates a payment criteria, irrespective of the method of accounting followed by the assessee, for deduction *qua* the sums specified thereunder, which stands rendered superfluous, with section 36(1)(va) also providing the same, i.e., the condition of payment, for the allowability of deduction there-under, and which is rather more stringent than that provided by section 43B. Further on, hon'ble Gujarat High Court has also recently, i.e., vide its decision in *CIT v. Gujarat State Road Transport Corporation* [2014] 41 taxmann.com 100 (Guj) (copy on record), relied upon by the Revenue before us, dealt with the matter in considerable detail, stating that the issue stands squarely covered by the relevant provisions, so that the deduction of the employee's contribution to the relevant funds would stand to be governed by the provisions of section 36(1)(va) r/w s. 2(24)(x), distinguishing and disapproving the several decisions by other High Courts advanced before it.

Be that as it may, the ld. Authorized Representative (AR), cited before us the decision by the hon'ble jurisdictional High Court in *CIT v. Hindustan Organics Chemicals Ltd.* (2014) 270 CTR 478 (Bom), placing a copy of the same on record, wherein the honb'le court has held the deduction in respect of employee's contribution as valid where deposited by the assessee-employer before the due date of filing of its return of income for the relevant year. True, the issue before the hon'ble court, as raised by the Revenue, was not the applicability or otherwise of the provisions of s. 36(1)(va) r/w s. 2(24)(x) to the impugned sum/s - which is the issue under reference and, further, as discerned by us. The hon'ble court was thus not called upon to answer the same; rather, proceeded on the basis of the deduction *qua* the relevant sum/s as being covered u/s. 43B, so that the issue was of the retrospectivity of the amendment to s. 43B by way of omission of the first *proviso* thereto, bringing the deductibility of the said sums at par with others covered by the said provision. However, again, it cannot be denied that per the said decision, which is judicially binding on us, the hon'ble court has abundantly clarified that the deduction in respect of the employee's contribution (to the employee welfare funds) in the hands of the assessee-employer is governed by the provision of section 43B, so that where deposited by the due date of the filing of the return for the

relevant year, shall be valid in terms of the amended s.43B, i.e., by Finance Act 2003, with effect from 01.04.2004, which amendment stands held by the apex court in *Alom Extrusions Ltd*. (supra) to the retrospective, so that it shall apply even to years prior to A.Y.2004-05. The hon'ble court, we note, does not discuss nor refer to any judicial precedents. The question of law framed by the Department, as well as its representation before the hon'ble court, leaves much to be desired. That, however, would not in any manner detract from or dilute its binding nature on us as a subordinate forum. We are not mentioning any of the decisions by the other high courts, also relied upon before us by the ld. AR. The reason is simple. None of them, which are not binding on us, as explained by the hon'ble Gujarat High Court, before which, likewise, several decisions by other high courts were cited in *Gujarat State Road Transport Corporation* (supra), address the pertinent issue, i.e., whether the impugned sums are at all governed by s. 43B, but proceed on the basis that it does, so that the issue is reduced to the year since which the amended s. 43B is applicable, which is in any case applicable for the current year. And, accordingly, constitutes the principal reason for the said court being not moved by the said decisions. In fact, as explained hereinbefore, even assuming so would also not assist the assessee's case inasmuch as s. 43B provides an additional condition *qua* sums otherwise allowable, so that the provision of s. 36(1)(va) r/w s. 2(24)(x) would in any case have to be complied with or satisfied.

Under the circumstances, notwithstanding the decisions holding otherwise cited in this order; the rationale of which stands also explained by us, or at bar, we, respectfully following the decision by the jurisdictional High Court in *Hindustan Organics Chemicals* (supra), allow the assesee's claim; it being admitted that the impugned payments were made well before the due date of the filing the return of income for the relevant year. Further, the fact that some of the impugned payments, admittedly made after the due dates under the relevant statutes, are outside the grace period allowed by the administrative or legal injunction (for the purpose of levy of interest, penalty, etc.), even as stated by the AO in his order, would be in this view of the matter of no consequence. We decide accordingly.

4. In the result, the appeal filed by the Revenue is dismissed.
परिणामतः राजस्व की अपील खारिज की जाती है ।

Order pronounced in the open court on December 03, 2014 at the conclusion of the hearing itself.

Sd/-	Sd/-
(Vivek Varma)	(Sanjay Arora)
न्यायिक सदस्य / Judicial Member	लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांकDated : 08.12.2014

नि.स./A.K.Patel, PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT – concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**