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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.1002 OF 2012
AND
INCOME TAX APPEAL NO.1034 OF 2012

The Commissioner of Income tax]
(Central), 'C' Wing, PMT Building,]
Swargate, Pune- 411 037.] .. Appellant.

V/s.

Ghatge Patil Transports Ltd.,]
517, E, Old P.B. Road,]
Kolhapur.] ..Respondent.

Mr.Vimal Gupta, Senior Advocate for the Appellant.

Mr.Mihir Naniwadekar for the Respondent.

CORAM : S.C. DHARMADHIKARI AND A.K. MENON, JJ.**RESERVED ON : 26TH SEPTEMBER, 2014****PRONOUNDED ON : 14TH OCTOBER, 2014.****JUDGMENT (PER A.K. MENON, J.)**

1. This order disposes of the above two appeals under Section 260A of the Income Tax Act, 1961 (the I.T. Act) which involve common questions of law, which read as under:-

- (1) Whether the decision of the ITAT ignoring the provisions of section 2(24)(x) r/w. 36(1)(va) as per which employee's contribution to ESI, PF and Pension fund is deductible only if payment is made before the due date as prescribed in the respective Act, Rule, Order or Notification governing such funds is erroneous and contrary to provisions of Income Tax Act, 1961 ?
- (2) Whether on the facts and circumstances of the case and in law, the Tribunal was right in ignoring the clear distinction between employee's contribution to ESI, PF and pension fund and employer's contribution and the fact that the decision of the Hon'ble Supreme Court in the case of Alom Extrusions Ltd. 319 ITR 306 is applicable only to employer's contribution ?
- (3) Whether on the facts and circumstances of the case and in law, the Tribunal was right in holding that payment of employees contribution to PF/ESI/pension fund is subject to provisions of section 43B of the Act ?
- (4) Whether the ITAT failed to appreciate the fact that the amendment to section 43B is applicable only to employer's contribution and not to employees contribution and hence, whether second proviso to section 43B omitted w.e.f. 01-04-04 is retrospective or not, is not germane to issue of employee's contribution ?

2. At the outset, Mr.Vimal Gupta, learned Senior Counsel

appearing on behalf of the Appellant submitted that the Appellant is not pressing question No.1. It is, therefore, not necessary to answer the same.

3. The appeals as filed pertain to orders passed by the Income Tax Appellate Tribunal, Pune 'A' Bench on 29th July, 2011 in Income Tax Appeal No.340/PN/10 in respect of assessment year 2003-04 and Income Tax Appeal No.341/PN/10 in respect of assessment year 2004-05.

4. The facts being similar, we will refer to the facts pertaining to Income Tax Appeal No.1002 of 2012 in respect of A.Y.2003-04. The assessee had filed a return of income declaring a total loss of Rs.1,88,71,600/- on 27th November, 2003. A Notice came to be issued under section 148 of the Income Tax Act, 1961 ('the I.T. Act') on 30th August, 2004 and while completing the assessment under section 143(3) r/w. Section 147 of the I.T. Act, additions were made on account of payment of employees contribution towards provident fund, ESI and pension fund in a sum of ₹32,03,947/-.

5. While disallowing the claim for deduction, the department contended that payment of employees' contribution had to be made

within the due date viz. on or before the 15th of every succeeding month. Admittedly, these payments were not so made but were paid after the due dates. The Assessing Officer, therefore, disallowed the deduction made to the extent of ₹32,03,547/-.

6. The Commissioner of Income Tax (Appeals) dismissed the issue of disallowance on account of payment of employees' contribution which was covered under section 36(1)(va) of the I.T. Act relying on the decision of this Court reported in **298 ITR 149** and held that the amendments to section 43B, on the basis of which relief could have been given to the assessee, were not retrospective. The Tribunal held that disallowance of the employees contribution made on account of provident fund, ESI and pension fund for assessment year 2003-04 was on account of delay in payment of the employees contribution was not sustainable.

7. The question arising, therefore, is (a) whether the Tribunal was right in ignoring the distinction between the employees contribution and employer's contribution and whether the decision of the Hon'ble Supreme Court in the case of **Commissioner of Income Tax V/s. Alom Extrusions Ltd.** reported in **[2009] 319 ITR 306** would apply only in the cases of employee's contribution and (b) whether the

Tribunal was right in holding that payment of employees contribution is subject to the provisions of section 43B of the I.T. Act entailing that amendment to section 43B would lead to the inclusion of the employers' contribution as well.

8. Mr. Gupta submitted that the Tribunal erred in deletion of addition of amount to the extent of Rs.32,03,947/- and that the impugned order dated 29th July, 2011 is liable to be quashed. Mr.Gupta relied upon the judgment of Punjab & Haryana in **Commissioner of Income-Tax V/s. Lakhani Rubber Works** reported in [2010] 326 ITR 415 (P & H) and submitted that question Nos.1 & 2 in that case had already been decided against the revenue in view of the decision of Alom Extrusions Ltd. (supra). It is for this reason that he did not press for an answer to question No.1 in these Appeals.

9. Mr.Naniwadekar, learned counsel appearing on behalf of the assessee on the other hand relied upon the decision of the Supreme Court upon the decision of Alom Extrusions (supra) and pointed out that the scheme of the Income Tax Act, 1961 as it existed prior to April 1, 1984 and thereafter.

10. He submitted that Section 43B made it mandatory for the

department to grant deduction in computing the income under section 28 in the year in which tax, duty, cess, etc. is actually paid. However, Parliament took cognizance of the fact that the accounting year of a company did not always tally with the due dates under certain statutes and, therefore, by way of the first proviso, an incentive / relaxation was sought to be given in respect of tax, duty, cess or fee by explicitly stating that if such tax, duty, cess or fee is paid before the date of filing of the return under the Income Tax Act, the assessee would be entitled to deduction. It did not apply to contributions to labour welfare funds.

11. The second proviso resulted in implementation problems and which led to deletion of the second proviso in the Finance Act, 2003 and bringing about uniformity in the first proviso by equating tax, duty, cess and fee with contributions to welfare funds like employees' provident fund, superannuation. Fund and other welfare funds. The first proviso by Finance Act, 2003 was made applicable with effect from April 1, 2004 and the assessee would argue that it was curative in nature, clarificatory and, therefore, applied retrospectively from 1st April, 1988. The department argued that it was clarifactory and, therefore, applied prospectively. The Supreme Court held that Finance Act, 2003 would be applicable retrospectively and defaulter who fails to pay the contribution to the welfare fund right upto April 1, 2004 and who pays

the contribution after April 1, 2004, would get the benefit of deduction under section 43B of the I.T. Act. It is held that the Finance Act, 2003 to the extent indicated above would be curative in nature and hence is retrospective. The reason being to be that the employers should not sit on the collected contributions and deprive the workmen of the rightful benefits under social welfare legislations by delaying payment of contributions to the welfare funds.

12. Mr.Naniwadekar also relied upon the judgment dated 11th July, 2014 in Income Tax Appeal No.399 of 2012 passed by this Court, to which one of us (S.C.Dharmadhikari,J.) was a party where following two issues of law were raised.:-

“(A) Whether on the facts and in the circumstances of the case, the Tribunal, in law, was right in allowing the claim of the Assessee on account of delayed payments of P.F. of employees' contribution amounting to Rs.1,82,77,138/- by relying on the decision of the Hon'ble Supreme Court in the case of CIT Vs/. Alom Extrusions Ltd. (319 ITR 306) ?

(B) Whether on the facts and in the circumstances of the case, the Tribunal in law, was right in deleting the disallowance of Rs.10,00,300/- on bond registration charges and allowing the claim of the assessee u/s. 37(1) of the I.T. Act, 1961 ?

13. In that judgment, this Court held that no substantial questions of law would arise since section 43B is inserted in the I.T. Act with effect from 1st April, 1984 by which the mercantile system of accounting with regard to tax, duty and contribution to welfare funds stood discontinued. Under section 43B of the I.T. Act, it became mandatory for the assessee to account for such payment including to welfare funds not on mercantile basis but on cash basis. The judgment further mentions that this situation continued between 1st April, 1984 and 1st April, 1988. It is also noticed that section 43B was again amended and the first proviso thereto has been added which was restricted to tax, duty, cess or fee excluding labour welfare. In view thereof, the second proviso as follows came to be inserted:-

“ 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 during the previous year on or before the due date as defined in the Explanation below clause (va) of sub-section (1) of section 36.”

The second proviso was further amended with effect from 1st April, 1989 to read as under:-

“ 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 realised within fifteen days from the due date.”

14. From a reading of above, it is clear that the employer-assessee would be entitled to deduction only if the contribution to the employee's welfare fund stood credited on or before the due date and not otherwise. It transpires that Industry once again made representations to the Ministry of Finance to remove this anomaly. The result was that an amendment was inserted which came into force with effect from 1st April, 2004 and two changes were made in section 43B firstly by deleting the second proviso and further amendment in the first proviso which reads as under:-

“ 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.”

15. In this manner, the amendment provided by Finance Act, 2003 put on par the benefit of deductions of tax, duty, cess and fee on the one hand with contributions to various Employees' Welfare Funds

on the other. All this came up for consideration before the Hon'ble Supreme Court in the case of *Alom Extrusions Ltd.* (supra). The Tribunal in the case at hand relied upon the said judgment. There is no reason to fault the order passed by the Tribunal. We are of the view that the decision of the Supreme Court in *Alom Extrusions Ltd.* applies to employees' contribution as well as employers' contribution. Question Nos.2, 3 & 4 are accordingly answered in favour of the assessee and against the revenue.

16. The facts in Income Tax Appeal No.1034 of 2012 are similar, except for the change in the assessment year and the questions arise out of the common order of the Tribunal dated 29th July, 2011 and accordingly the question Nos.2, 3 & 4 are answered in favour of the assessee and against the revenue. We hold that both employees' and employer's contributions are covered under the amendment to Section 43B of I.T. Act and the *Alom Extrusions* judgment. Hence the Tribunal was right in holding that payments thereof are subject to benefits of Section 43B. Both the appeals are disposed of accordingly. No order as to costs.

(A.K. MENON, J.)

(S.C.DHARMADHIKARI, J.)