

**IN THE INCOME TAX APPELLATE TRIBUNAL
"C" Bench, Mumbai**

**Before Shri Jason P. Boaz, Accountant Member
and Shri Ram Lal Negi, Judicial Member**

ITA No. 2638/Mum/2016
(Assessment Year: 2012-13)

M/s. Ray Engineering Ltd. Plot No. 2, Ray Compound Post IIT Market, Powai Mumbai 400076	Vs.	Dy. C.I.T. 15(3)(1) Room No. 451, 4 th Floor Aayakar Bhavan, M.K. Road Mumbai 400020
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PAN – AADCR3859C

Appellant

Respondent

Appellant by: Shri Ashok J. Patil
Respondent by: Ms. Arju Garodia

Date of Hearing: 08.02.2017
Date of Pronouncement: 01.03.2017

ORDER

Per Jason P. Boaz, A.M.

This appeal by the assessee is directed against the order of the CIT(A)-24, Mumbai dated 25.01.2016 for A.Y. 2012-13.

2. The facts of the case, briefly stated, are as under: -

2.1 The assessee, a company engaged in construction work, filed its return of income for A.Y. 2012-13 on 22.09.2012 declaring total income of ₹15,80,66,050/-. The return was processed under section 143(1) of the Income Tax Act, 1961 (in short 'the Act') and the case was subsequently taken up for scrutiny. The assessment was completed under section 143(3) of the Act vide order dated 31.01.2015 wherein the assessee's income under normal provisions was determined at ₹16,34,64,440/- in view of the following disallowances: -

- | | |
|----------------------------------------------------------------------------------|---------------|
| (i) Under section 2(24)(x) r.w.s 36(1)(va) on account of delayed payments of EPF | ₹ 28,70,807/- |
| (ii) Interest on delayed payment of TDS | ₹ 71,043/- |
| (iii) Disallowance under section 43B | ₹ 39,16,035/- |

2.2 Aggrieved by the order of assessment for A.Y. 2012-13 dated 31.01.2015, the assessee preferred an appeal before the CIT(A)-24, Mumbai, which was dismissed vide the impugned order dated 25.01.2016.

3.1 Aggrieved by the order of the CIT(A)-24, Mumbai dated 25.01.2016 the assessee has preferred this appeal raising the following grounds: -

- “01. On the facts and circumstances of the case and in law the Commissioner of Income tax (Appeals 24 erred in confirming the disallowance made by the Assessing Officer with regard to contribution of Employees Provident Fund of Rs.28,70,807/- paid before the due date of filing the income tax return.*
- 02. The Commissioner of Income Tax (Appeals) 24 failed to appreciate that the issue was covered in favour of the Appellant by the jurisdictional High Court in the case of CIT v. Hindustan Organic Chemicals Ltd. ITXA 399/12 dated 27-06-2014, but instead relied on the decision in the case of CIT v. Gujarat State Road Transport Corporation 366 ITR 170 (Guj.)*
- 03. The Appellant craves leave to add amend or delete any of the grounds of appeal.”*

3.2 All these grounds (supra) pertain to the single issue of challenging the order of the learned CIT(A) in upholding the disallowance of ₹28,70,807/- made by the Assessing Officer (AO) on account of delayed payment of contribution to EPF in accordance with provisions of section 2(24)(x) r.w.s. 36(1) of the Act relying on the judgement of the Hon'ble Gujarat High Court in the case of CIT vs. Gujarat State Road Transport Corporation (366 ITR 170) (Guj). It is submitted that the said amount of EPF were paid by the assessee before the due date of filing of the return of income for A.Y. 2012013. According to the learned A.R. of the assessee this issue in question, i.e. payment of contribution to Employees Provident Fund (EPF) is covered in favour of the assessee by the decision of the Hon'ble Bombay High Court in the case of CIT vs. Hindustan Organic Chemicals Ltd. (2014) 366 ITR 1) (Bom).

3.3 Per contra, the learned D.R. for Revenue placed strong reliance on the decision of the learned CIT(A) on this issue.

3.4.1 We have heard the rival contentions and carefully considered the material on record, including the judicial pronouncements cited and

placed reliance upon. It is not disputed that the fact situation is that though the contribution of EPF was not paid within the period specified under the PF Act; the same has been paid before the due date of filing of the return of income in the case on hand for A.Y. 2012-13. In this factual matrix, we are of the view that this issue is squarely covered by the decision of the jurisdictional High Court in the case of CIT vs. Hindustan Organics Chemicals Ltd. (2014) (366 ITR 1) (Bom). In its judgement their Lordships, while dismissing Revenue's appeal on this issue, held that the deduction claimed on this count by the assessee could not have been disallowed. The second proviso to section 43B of the Act was deleted w.e.f. 01.04.2004 and simultaneously the first proviso was also amended bringing about uniformity in deduction claimed towards tax, duty, cess and fee on the one hand and contribution to EPF, superannuation fund and other welfare funds on the other. In coming to this finding the Hon'ble Bombay High Court applied the decision of the Hon'ble Apex Court in the case of CIT vs. Alom Extrusions Ltd. (2009) 319 ITR 306 (SC).

3.4.2 On similar facts as in the case on hand, we find that this issue of the assessee's claim for deduction of contribution to EPF under section 43B of the Act is squarely covered by the decision of the Hon'ble Bombay High Court in the case of CIT vs. Hindustan Organics Chemicals Ltd. (supra) wherein at paras 5 to 9 of its order, while dismissing Revenue's appeal, has held as under: -

"5. We find no merit in the aforestated contention. Section 43B of the Income Tax Act 1961 was inserted in the 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 and under section 43B of the Act, it became mandatory for the Assesseees to account for the aforestated items not on a mercantile basis but on a cash basis. This situation continued between 1st April 1984 and 1st April 1988 when Parliament again amended section 43B and inserted the first proviso thereto which inter alia laid down that in the context of any sum payable by the Assessee by way of tax, duty, cess or fee, if paid by the Assessee even after the closing of the accounting year but before the date of filing of the return of income, the Assessee would be entitled to the deduction under section 43B on actual payment basis and such deduction would be admissible for that accounting year. This proviso however did not apply to contributions

made by the Assesseees to the Labour Welfare Funds. In view thereof, by the Finance Act 1988, the second proviso came to be inserted which 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 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.”

Thereafter, the said second proviso was further amended vide Finance Act 1989 with effect from 1st April 1989 which 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.”

6. On a plain reading of the above provisos, it became ex-facie clear that the Assesseees – employers were entitled to deductions only if the contributions to any fund for the welfare of the employees stood credited on or before the due date given in the relevant Act.

7. However, the second proviso once again created further difficulties for the Assesseees – employers. Therefore, Industry once again made representations to the Ministry of Finance who, after taking cognizance of the difficulties, inserted an amendment vide Finance Act, 2003 which came into force with effect from 1st April 2004. In other words, with effect from 1st April 2004, two changes were made in section 43B viz. deletion of the second proviso to section 43B 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.”

Therefore, the amendments introduced by the Finance Act, 2003 put on par the benefit of deductions of tax, duty, cess and fee on the one hand with contributions to various Employee’s Welfare Funds on the other.

8. The section referred to above viz. section 43B and the amendments thereto came up for consideration before the Hon'ble Supreme Court in the case of **Commissioner of Income Tax v/s Alom Extrusions Ltd., reported in (2009) 319 ITR 306 (SC)** when the Supreme Court inter alia held that the amendments to the said section brought about by the Finance Act, 2003 with effect from 1st April 2004 were

retrospective in nature and would operate from 1st April 1988. The ITAT, relying upon the aforesaid judgment of the Supreme Court, has dismissed the Revenue's Appeal and confirmed the order passed by the CIT (Appeals). In this view of the matter and in view of the fact that the Supreme Court has expressly held that the amendments to section 43B that were brought about by the Finance Act, 2003 are retrospective in nature, we find that the ITAT was fully justified in deleting the addition of Rs.1,82,77,138/- on account of delayed payment of Provident Fund of employees' contribution. We therefore find that no substantial question of law arises on this count as sought to be contended by Mr Malhotra on behalf of the Revenue.

9. Even otherwise, we fail to understand how this deduction could have been disallowed to the Assessee. Admittedly, the Assessment Year in question is 2006-07. The second proviso to section 43B quoted above was deleted with effect from 1st April 2004 and simultaneously the first proviso was also amended bringing about a uniformity in deductions claimed towards tax, duty, cess and fee on the one hand and contribution to the employees' provident fund, superannuation fund and other welfare funds on the other. These deductions being claimed in the return of income filed for the Assessment Year 2006-07, the amendments to Section 43B which came into force with effect from 1st April 2004 would have clearly applied to the Assessee's case. In this view of the matter also, we find that the ITAT was fully justified in deleting the addition of Rs.1,82,77,138/- on account of delayed payment of provident fund of employees' contribution."

3.4.3 Respectfully following the decision of the Hon'ble Bombay High Court in the case of CIT vs. Hindustan Organics Chemicals Ltd. (2014) (366 ITR 1) (Bom), we reverse the orders of the learned CIT(A) on this issue and direct the authorities below to allow the assessee's claim for deduction on account of contributions to employees provident fund (EPF) amounting to ₹28,70,807/- under section 43B of the Act which, admittedly, have been paid before the due date for filing the return of income for A.Y. 2012-13. Consequently, assessee's grounds of appeal 1 to 3 are allowed.

4. In the result, the assessee's appeal for A.Y. 2012-13 is allowed.

Order pronounced in the open court on 1st March, 2017.

Sd/-
(Ram Lal Negi)
Judicial Member

Sd/-
(Jason P. Boaz)
Accountant Member

Mumbai, Dated: 1st March, 2017

Copy to:

1. *The Appellant*
2. *The Respondent*
3. *The CIT(A) -24, Mumbai*
4. *The CIT - 15, Mumbai*
5. *The DR, "C" Bench, ITAT, Mumbai*

By Order

//True Copy//

*Assistant Registrar
ITAT, Mumbai Benches, Mumbai*

n.p.