IN THE INCOME TAX APPELLATE TRIBUNAL CUTTACK
'SMC' BENCH, CUTTACK

BEFORE SHRI N.S SAINI, ACCOUNTANT MEMBER

ITA No.06/CTK/2017
Assessment Year : 2012-2013

Orissa Air Products (P) Ltd., NH-42, Gundicha Pada, Dhenkanal.	Vs.	ACIT, Circle 1(2), Bhubaneswar.
PAN/GIR No. AAACO 6590 J		
(Appellant)	..	(**Respondent**)

Assessee by : Shri T.K.Agarwal, AR
Revenue by : Shri D.K.Pradhan, DR

Date of Hearing : 17 /05/ 2017
Date of Pronouncement : 18 /05/ 2017

ORDER

This is an appeal filed by the assessee against the order of CIT(A)-1, Bhubaneswar, dated 8.9.2016, for the assessment year 2012-2013 .

2. Ground No.1 of the appeal is directed against the order of the CIT(A) confirming the addition of Rs.2,22,365/- under section 2(24)(x) read with section 36(1)(va) of the Act.

3. Brief facts of the case are that the Assessing Officer observed that the employees contributions to provident fund were not deposited within the due date specified under the relevant Statute. Therefore, he disallowed

deduction of Rs.2,22,365/- under section 2(24)(x) read with section 36(1)(va) of the Act.

4. On appeal, the CIT(A) confirmed the action of the Assessing Officer relying on the decision of Hon'ble Gujarat High Court in the case of CIT vs Gujarat State Road Transport Corpn. (2014) 366 ITR 170 (Guj) order dated 26.12.2013, wherein, it was held that if the assessee has not credited the employee's contribution to the employees' account in the relevant fund or funds on or before the due date mentioned in the Explanation to section 36(1)(va), the assessee shall not be entitled to deduction of such amount in computing the income referred to in section 28.

5. Before me, ld Authorised Representative of the assessee submitted that the Hon'ble Delhi High Court in *CIT Vs. AIMIL Limited [2010] 321 ITR 508 (DEL)* has held that the employees' contribution towards EPF and ESI etc. deposited after the due date but before the time allowed for filing the return u/s.139(1) will not call for any disallowance u/s.36(1)(va). He further submitted that where there are contrary decisions of different High Courts on an issue and none of them is the Hon'ble Jurisdictional High Court, then the decision favourable to the assessee should be followed in view of the decision of Hon'ble Supreme Court in the case of CIT vs. Vegetables Product Ltd., 88 ITR 192 (SC).

6. On the other hand, ld D.R. relied on the orders of lower authorities.

7. I find that that the Hon'ble Karnataka High Court in the case of Essae Teraoka (P) Ltd.vs DCIT, (2014) 366 ITR 408 vide judgment dated 4.2.2014 held that the word contribution would mean in EPF and ESI Act refers to both employees and employers contribution to PF and, therefore, no disallowance is to be made under section 43B. Therefore, deduction is also available to employee's contribution to PF U/S.43B of the Act. Further, the Hon'ble Rajasthan High Court in the case of CIT Vs. State Bank of Bikaner and jaipur (2014) 363 ITR 70 (Raj) (HC) and Jaipur Vidyut Vitaran Nigam Ltd., (2014) 363 ITR 307 (Raj) held that section 43B overrides section 36(1)(va) and deduction is available for employees contribution u/s.43B of the Act To same effect is the decision of Hon'ble Uttarakhand High Court in the case of CIT vs.Kichha Sugar Company Ltd **. (2013) 356 ITR 351 (Uttarakhand–H**C) order dated 20.5.2013. To the same effect is also the decision of Hon'ble Rajasthan High court in the case of CIT vs. Udaipur Dugdh Utpadak Sahakari Sangh Ltd (2013) 35 taxmann.com 616 (Raj). The contrary view is that of Hon'ble Gujarat High Court in the case of CIT vs Gujarat State Road Transport Corpn. (2014) 366 ITR 170 (Guj) order dated 26.12.2013, wherein, it was held that 43B does not apply to employees contribution and only section 2(24)(x) read with section 36(1)(va) is applicable. Therefore, employee's contribution is disallowed if not paid within the due date as per EPF/ESI Act. The said decision was rendered after considering the decision of Hon'ble Supreme Court in the case of Alom Extrusions (supra). The Hon'ble Calcutta High Court in the

case of CIT vs Vijaya Shree Ltd., (2011) TMI 30 held that employees contribution to PF/ESI is also covered by section 43B and is allowable as deduction if paid before due date of filing the return of income. The Hon'ble Bombay High Court in the case of CIT Vs. Ghatge Patil Transports Ltd., (2014), 368 ITR 749 has held that employees contribution to PF and ESI is allowable if the same is deposited before the due date of filing of return of income u/s.2(24)(x) r.w.s. 36(1)(va) and 43B of the Act. The Hon'ble Delhi High Court in *CIT Vs. AIMIL Limited [2010] 321 ITR 508 (DEL)* has held that the employees' contribution towards EPF and ESI etc. deposited after the due date but before the time allowed for filing the return u/s.139(1) will not call for any disallowance u/s.36(1)(va). The Hon'ble Patna High Court in the case of Bihar State Warehousing Corporation Ltd vs CIT, (2016) 71 taxmann.com 247(Patna) after considering the decision of Hon'ble Bombay High Court in the case of Ghatge Patil Transports Ltd and P&H High Court in the case of CIT vs. Hemla Embroidery Mills (P) Ltd., 2014) 366 ITR 167 (P&H) and the decision of Hon'ble Supreme Court in the case of Alom Extrusion Ltd., (supra) has held as under:

> "9.On further appeal both by the Department and the Assessee, the appeal of the Department was dismissed as also that of the assessee. Aggrieved by the same, the present appeal has been filed by the assessee. The appeal was admitted on the following substantial questions of law:—
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> > "(i) Whether on the facts and in the circumstances of the case the Tribunal is justified in upholding the addition of Rs.8,32,507/- made under Section 2 (24)(x) read with Section 36(l)(va) of the Income-tax Act?

(ii) Whether on the facts and in the circumstances of the case the Tribunal is correct in holding that the provision for gratuity was not made towards approved gratuity fund and that the gratuity has not become payable during the financial year and that the provision has not been made on actuarial valuation basis?"

10. Learned counsel for the assessee submits that the Tribunal was not justified in not following its earlier order dated 20.12.2001 passed in the case of *M/s. Sintra Ltd.* v. *ACIT* I.T.Appeal No. 497/Pat/1996 in which under similar circumstances, it was held that the treatment meted out to the employees' contribution by disallowing the same was also on the basis, i.e., the delay in credit to the appropriate authorities, which was condoned by the appropriate authorities and thus the contention of the Department was found to be without force and it was held that there was no reason to consider the amount as income from other sources of the assessee and the addition was deleted. It is submitted that the present matter is practically on the same footing as the employees' contributions were paid within due date of filing of return and as a matter of fact some of the amounts of employees' contribution was deposited well within the financial year 1.4 2002 to 31.03.2003 itself. It is further submitted by learned counsel that there was no reason to treat/consider the said delayed payment in a different manner from the employer's contribution to the Provident Fund and both should have been dealt with under Section 43B of the Act and there was no justification for invoking sub-section (2) of Section 24 (x) read with Section 36 (1) (va) of the Act for disallowing the same.

11. In support of the aforesaid stand, learned counsel for the appellant relies upon a decision of the Supreme Court in the case of *CIT* v. *Alom Extrusions Ltd.* [20091 319 ITR 306/185 Taxman 416. following which the Bombay High Court in the case of *CIT* v. *Ghatge Patil Transports Ltd.* [2014] 368 ITR 749/228 Taxman 340/53 taxmaim.com 141 and Punjab and Haryana High Court in the case of *CIT* v. *Hernia Embroidery Mills (P.) Ltd.* [20141 366 ITR 167/217 Taxman 207/37 taxmann.com 160 (Puni. & Har.) have held that both the employees' and employer's contributions are covered under the amendment to Section 43B of the Income Tax Act and the Alom Extrusions judgment of the Supreme Court and therefore the Tribunal was right in holding that the payments thereof were subject to benefits of Section 43B of the Act.

12. Learned counsel for the Income-tax Department, on the other hand submits that the Tribunal has rightly made a distinction in the matter with regard to delay in payment of employees' contribution to the Provident Fund and delayed payment of employer's contribution to Provident Fund. It is

submitted that the appeal of the Department has been rejected by the Tribunal making a distinction between the two provisions which appear to be justified. It is urged that only the payment of employer's contribution to Provident Fund is covered by the provision of Section 43B of the Act and employees' contribution is squarely covered by the provisions of Section (2) (24) (x) read with Section 36(l)(va) of the Act. It is, thus, submitted that the Tribunal has rightly decided the present matter and was not obliged to follow a wrong decision earlier rendered in *Ms. Sintra's* case *{supra).*

13. In the case *of Alom Extrusions Ltd. {supra),* the Apex Court has dealt with the history of Section 43 B of the Act along with its proviso and referred to the fact that the amendments were made therein on account of difficulties felt in complying, with the provisions of the said section vis-a-vis the period prescribed under the Employees Provident Fund Act. Earlier by way of the first proviso the benefit of deduction was restricted only to tax, duty, cess or fee paid after the closing of the accounting year but before the date of filing of the return of income under Section 139 (1) but not to labour welfare funds. The second proviso was then inserted to allow deduction of contribution to, inter alia, any provident fund if made before the due date as per the Employees Provident Fund Act during the previous year. This again resulted in implementation problems as a result of which the second proviso was deleted and the first proviso was amended bringing about uniformity by equating tax, duty and fee with contribution to labour welfare funds. It was made clear that the benefit of deduction would be applicable, provided the payments are made before the due date for filing of the return.

14. From a perusal of the aforesaid decision, it is evident that it does not specifically refer to the employees' contribution or employer's contribution and both have been treated on the same footing. So far as difficulties in complying with the due date under the EPF Act vis-a-vis the previous year of the Income-tax is concerned, there can be no distinction between the payment of employees or employer's contribution and the same difficulties would be faced for both. In Alom Extrusions' case, the Court has broadly dealt with contribution to be made by the employers to the Labour Welfare Fund without making any distinction between employees and employer's contributions, as the deposits have to be made by the employer of both type of contributions.

15. The issue as to whether a distinction can be made between the employees' contribution and employer's contribution with regard to applicability of Section 43B of the Act was squarely raised before the Bombay High Court in *Ghatge Patil Transports* case *{supra)* and before the Punjab and Haryana High Court in *Hernia Embroidery Mills'* case *{supra)* and both the High Courts have answered the same holding that both the

employees' and employer's contributions are covered by the amendment of Section 43B of the Act after considering *Alom Extrusions'case {supra).*

16. Although technical reading of Section 43B and the provisions of sub-section (2) of Section 24 (x) read with Section 36 (1) (va) of the Act creates the impression that the employees' contribution would continue to be treated differently under a different head of deduction, as the head of deduction is separate under Section 43 B and Section 36 of the Act but on a broader reading of the amendments made to Section 43B repeatedly and the intention of Parliament, there appears to be sufficient justification for taking the view that the employees' and the employer's contribution ought to be treated in the same manner. In *Alom Extrusions'case (supra),* as pointed out earlier, the Supreme Court has not made any distinction between the two as similar problem of implementation would arise in both the cases, although specific issue was not raised therein; but both the Bombay High Court and the Punjab and Haryana High Court in the above referred cases after considering *Alom Extrusions'* case *(supra)* have answered the question treating the two contributions on the same footing.

17. Thus, I am inclined to respectfully agree with the view taken by the Bombay High Court and the Punjab and Haryana High Court."

8. It is also settled position of law that if there are contrary views of different High Courts and none of them is the Hon'ble Jurisdictional High Court, then the decision favourable to the assessee should be followed. This view is supported by the decision of Hon'ble Supreme Court in the case of CIT vs. Vegetables Product Ltd., 88 ITR 192 (SC). Therefore, respectfully following the decision of Hon'ble Karnataka High Court in the case of Essae Teraoka (P) Ltd.vs DCIT (supra) and other decisions referred above (supra), I hold that employees contribution to PF and ESI is allowable deduction to the assessee if deposited before due date of filing of return u/s.139(1)of the Act.

9. In the instant case, it is not in dispute that the contribution to PF was deposited by the assessee before due date of filing the return of income u/s.139(1) of the Act. Therefore, I set aside the orders of lower authorities and delete the disallowance of employees contribution to PF of Rs.2,22,365/- and allow this ground of appeal of the assessee.

10. In Ground Nos.2 & 3 of the appeal, the grievance of the assessee is that the CIT(A) erred in confirming the disallowance of Rs.5,71,550/- as proportionate interest.

11. I have heard the rival submissions and perused the orders of lower authorities and materials available on record. In the instant case, the undisputed facts of the case are that the Assessing Officer observed that the assessee has claimed interest expenditure of Rs.10,39,235/- on working capital term loan and to others. He observed that on perusal of balance sheet, it is observed that huge long term advances have been made to companies in which the directors are substantially interested. Hence, he made disallowance of proportionate interest relating to advances made to companies in which directors are substantially interested and added Rs.5,71,550/- to the total income of the assessee.

12. On appeal, the CIT(A) held that the assessee failed to show that no borrowed fund is diverted in the form of interest free loan and, therefore, the disallowance made by the Assessing Officer was fully justified.

13. Before me, ld A.R. of the assessee referred to pages 31 & 32 of paper book and submitted that from the copy of balance sheet and profit and loss account of the assessee placed in the paper book, it will be seen that the assessee had own non-interest bearing funds in the form of share capital reserves and surplus of Rs.68,86,258/-. The assessee has advanced interest free loans and advances to sister concern of Rs.47,62,965/-. Hence, it was his submission that the presumption is that the interest free loans and advances was out of interest free funds of the assessee and hence, no disallowance of interest was warranted. For this, he placed reliance on the decision of Hon'ble Gujarat High Court in the case of CIT vs. Torrent Power Ltd.. 363 ITR 474 (Guj.) , wherein, it was held that the assessee had sufficient funds for making investments and it has not used borrowed funds for such purposes and, therefore, no disallowance of interest expenditure was warranted. He also relied on the decision of Hon'ble Supreme Court in the case of Munjal Sales Corporation vs CIT, 298 ITR 298 (SC), wherein, it was held that the assessee advanced interest free loan to its sister concern amounting to Rs.5 lacs. According to the Tribunal, there was nothing on record to show that the loans were given to the sister concern by the assessee firm out of its own funds and, therefore, it was not entitled to claim deduction under s. 36(1)(iii). This finding is erroneous. The opening balance as on 1st April, 1994 was Rs. 1.91 crores whereas the loan given to the sister concern was a small amount of Rs. 5 lacs. The

profits earned by the assessee during the relevant year were sufficient to cover the impugned loan of Rs. 5 lacs.

14. On the other hand, ld D.R. relied on the orders of lower authorities.

15. After considering the rival submissions and perusing the materials available on record, I find that the undisputed facts of the case are that the assessee had interest free own funds in the form of share capital and reserves and surplus of Rs.68,86,258/-. The assessee had advanced interest free loans and advances to sister concern of Rs.47,62,915/-. Thus, the interest free funds of the assessee are more than the interest free advance given by the assessee to its sister concern. No material has been brought on record by the revenue to show that the interest free advance given by the assessee was out of borrowed funds of the assessee. In absence of any such material being brought on record, I find that the facts of the assessee's case are covered by the decision of Hon'ble Gujarat High Court in the case of Torrent Power Ltd(supra) and also the decision of Hon'ble Supreme Court in the case of Manjula Sales Corporation (supra). Therefore, respectfully following the same, I set aside the orders of lower authorities and delete the disallowance of interest of Rs.5,71,550/- and allow this ground of appeal of the assessee.

16. In Ground Nos. 4 & 5 of the appeal, the grievance of the assessee is that the CIT(A) erred in confirming the disallowance of depreciation on

motor cars and expenditure and expenditure on motor cars @ 20% on account of personal use.

17. I have heard the rival submissions and perused the orders of lower authorities and materials available on record. The undisputed facts of the case are that the Assessing Officer observed that the assessee has claimed depreciation on vehicles which includes six cars and one truck. The Assessing Officer observed that there was no justification for use of three cars shown by the assessee by one Director alone. Further, the nature of work executed by the persons shown to be using the cars cannot be held to be in tune with the normal curriculum of activities carried out them. Therefore, he disallowed proportionate depreciation of Rs.4,94,538/-.

18. On appeal, the CIT(A) observed that since the total depreciation claimed on the motor vehicles stands at Rs.6,27,248/-, the disallowance of Rs.4,94,538/- out of the same appears to be very high. The Assessing Officer has not given any basis for the calculation of the amount of disallowance in the assessment order. Therefore, he disallowed 20% out of the total claim of depreciation of Rs.6,27,248/- to take care of personal use of the vehicles by the Directors and others. Hence, he restricted the disallowance to Rs.1,25,450/-.

19. Similarly, the Assessing Officer observed that the assessee has claimed motor car expenses of Rs.4,10,294/-. He disallowed Rs.2,72,395/- out of Rs.4,10,294/- on account of personal use of cars.

20. On appeal, the CIT(A) restricted the disallowance to 20% of the expenses, which works out to Rs.82,059/- and allowed relief of Rs.1,90,336/-.

21. Before me, ld A.R. of the assessee relied on the decision of Hon'ble Gujarat High Court in the case **SAYAJI IRON & ENGG. CO. vs. COMMISSIONER OF INCOME TAX** , 253 ITR 749 (Guj), wherein, it was held as under:

> **"9.1. There is one more aspect of the matter which requires to be considered. The assessee which is a private limited company is a distinct assessable entity as per definition of "person" under s. 2(31) of the Act. Therefore, it cannot be stated that when the vehicles are used by the directors, "even if they are personally used by the directors" the vehicles are personally used by the company, because a limited company by its very nature cannot have any 'personal use'. The limited company is an inanimate person and there cannot be anything personal about such an entity. The view that we are adopting is supported by the provision of s. 40(c) and s. 40A(5) of the Act."**

22. He submitted that in view of the above decision of Hon'ble Gujarat High Court , the disallowance made on account of depreciation on motor cars and expenditure incurred should be deleted.

23. Ld D.R. relied on the orders of lower authorities.

24. I find that no contrary decision could be cited by ld D.R. during the course of hearing. I find that the facts of the assessee's care are covered by the decision of Hon'ble Gujarat High Court in the case of Sayaji Iron & Engg. Co. (supra) and respectfully following the same, I set aside the orders of lower authorities and delete the disallowance of Rs.4,94,538/- made on

account of depreciation on motor cars and Rs.2,72,395/- on account of motor car expenses and allow the grounds of appeal of the assessee.

25. In Ground No.6 of the appeal, the grievance of the assessee is that the CIT(A) erred in confirming adhoc disallowance made by the Assessing Officer at Rs.79,132/-.

26. I find that this ground does not arise out of the order of the CIT(A) and, therefore, same is dismissed.

27. In the result, the appeal filed by the assessee is partly allowed.

Order pronounced in the open court on 18 /05/2017 in the presence of parties.

Sd/-

(N.S Saini)
A**CCOUNTANT MEMBER**

Cuttack; Dated 18 /05/2017
B.K.Parida, SPS

Copy of the Order forwarded to :

1. The Appellant : Orissa Air Products (P) Ltd., NH-42, Gundicha Pada, Dhenkanal.
2. The Respondent. ACIT, Circle 1(2), Bhubaneswar.
3. The CIT(A)-1, Bhubaneswar.
4. Pr.CIT-1, Bhubaneswar.
5. DR, ITAT, Cuttack
6. Guard file.

//True Copy//

BY ORDER,

SR.PRIVATE *SECRETARY*
ITAT, Cuttack