IN THE INCOME TAX APPELLATE TRIBUNAL
"SMC - C" BENCH : BANGALORE

BEFORE SHRI SUNIL KUMAR YADAV, JUDICIAL MEMBER

ITA No.513/Bang/2017
Assessment year : 2010-11

The Deputy Commissioner of Income Tax, Circle 6(1)(2), Bangalore.	Vs.	M/s. Spectrum Consultants India Private Ltd., No.780, 1st Cross, 12th Main, HAL 2nd Stage, Bengaluru – 560 008. **PAN: AABCS 7552F**
APPELLANT		RESPONDENT

Appellant by	:	Smt. Swapna Das, Jt.CIT(DR)(ITAT)-2, Bengaluru
Respondent by	:	Shri Sreehari Kutsa, CA

Date of hearing	:	17.05.2017
Date of Pronouncement	:	26.05.2017

O R D E R

This appeal is preferred by the revenue against the order of CIT(Appeals) *inter alia* on the following grounds:-

"1. The order of the CIT (Appeals) is opposed to law and the facts and circumstances of the case.

2. On the facts and in circumstances of the case, the CIT(A) erred in directing the Assessing Officer to delete the disallowance made on account of belated payment of Employees' contribution of Provident Fund and ESI, since such sums which are considered as income u/s 2(24)(x), can be allowed as deduction only when

paid before the due date in terms of the provisions of Section 36(1)(va) of the LT. Act.

3. On the facts and in circumstances of the case, the CIT(A) erred in deleting the addition made by the AO by placing reliance upon the case of CIT Vs Magus Customers Dialog Pvt. Ltd., without appreciating the fact that SLP filed by the Department against this decision has not reached finality yet. Further, CBDT, vide Instruction No.22/2015 has clarified that employees' contribution towards ESI & PF are not allowable if paid belatedly.

4. For these and such other grounds that may be urged at the time of hearing, it is humbly prayed that the order of the CIT(A) in so far as it relates to the above grounds may be reversed and that of the Assessing Officer be restored.

5. The appellant craves leave to add, alter, amend or delete any of the grounds that may be urged at the time of hearing of the appeal."

2. Though various grounds are raised in this appeal, but they all relate to disallowance made on account of belated payment of employees' contribution to Provident Fund and ESI.

3. During the course of hearing, the ld. counsel for the assessee has invited our attention that an identical issue was examined by the Hon'ble High Court of Karnataka in the assessee's own case in W.P. No.8834 of 2011 relating to AY 2006-07 in which the Hon'ble High Court has categorically held that there can be no doubt that the AO as well as revenue authorities fell in error in disallowing deduction of Rs.22,91,791 being the employees' contribution remitted by the petitioner-employer both

under ESI and EPF Act before the financial year ending March 31, 2006 and balance as extended upto 30.11.2006. The relevant observations of the Hon'ble High Court in assessee's own case are extracted hereunder for the sake of reference:-

> "4. Having heard the learned counsel for the parties, perused the pleadings and examined the order impugned, the core question for decision making is:
>
> > "Whether the assessing authority and the revision authority were correct in disallowing the deduction towards contributions remitted by the petitioner, employee - assessee under the EPF and ESI Act, though some of which were remitted beyond the stipulated periods prescribed under the said statutes and the mandatory provisions of Sec.36(1)(va) r/w Sec.2(24)(x) and Sec.43B of the Act, while the said payments were effected by the assessee before the due date for filing returns of income under Sec.139(1) of the Act, as extended upto 30/11/2006 ?"
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> 5. Facts not being in dispute, petitioner remitted Rs.20,76,915/- from out of RS.22,91,791/- during the financial year ending 31/3/2006 and the balance, well before the extended date ie., 30/11/2006 for filing of return of income under Sec.139(1) of the Act (though details of the dates of remittances and the due dates are furnished in Annex.B disclosing the number of days delay, as also the dates when there was no delay), coupled with the non-obstante clause in Sec.43B of the Act, and the words "due date" in the proviso to Subsec.(b) thereto, read with the word 'due date' in the explanation to Sec.36(1)(va) of the Act, the authorities were not justified in disallowing Rs.22,91,791/- being the employees' contribution remitted by the employer, petitioner-assessee.
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> 6. In Sabari Enterprises case, the Division Bench after extracting Sec.2(24)(x), Sec.36(1)(va) and Sec.43B(b), regard being had to the expression "due date", meaning the date by which the assessee is required, as an employer, to credit the contributions to the employees' account in the relevant fund under any Act, Rule or Order or notification issued thereunder or

under any standing order, award or contract of service or otherwise, as well as non-obstante clause in Sec.43B, held that the provisions read along with the first proviso to the section as was inserted by Finance Act, 1987, which came into effect from 1/4/1988, deduction towards the Employees' contribution paid can be claimed by the Assessee. Their Lordships further held thus:

> "The explanation to Clause (va) of Sec.36(1) of the Income Tax Act further makes it very clear that the amount actually paid by the assessee on or before the due date applicable in this case at the time of submitting returns of income under Sec.139 of the Act to the Revenue in respect of the previous years can be claimed by the assessee for deduction out of their gross income". The plea of the Revenue that deductions from out of the gross income of payment of tax at the time of submitting of returns under Sec.139 is permissible only if the statutory liability of payment of provident fund or other contribution referred to in clause (b) are paid within the due date under the respective statutory enactments by the assessee, was not accepted as tenable in law."

7. It is no doubt true that in ALOM Extrusions case, the question that fell for consideration by the Apex Court was, whether the omission (deletion) of the second proviso to Sec.43B of the Act by Finance Act 2003 operated w.e.f. 1/4/2004 or retrospectively w.e.f. 1/4/1988? In order to answer the said question, the Apex Court felt the need to understand the scheme of the Act as it existed prior to 1/4/1984 and as it stood after 1/4/1984 and accordingly examined the definition of the term 'income' under Sec.2(24)(x), the mercantile system of accounting with regard to tax, duty and contribution to welfare funds, which was discontinued under Sec.43B leading to the introduction of the first proviso w.e.f. 1/4/1988 and the insertion of the second proviso vide Finance Act 1988, making reference to the term 'due date' in the explanation to Sec.36(1)(va) of the Act, as well as the amended second proviso by Finance Act 1989, w.e.f. 1/4/1989. Their Lordships observed that the hardship caused to employers was addressed and by the Finance Act 2003, w.e.f. 1/4/2004, two changes were made, namely deletion of second proviso and further amendment to the first proviso, equated in terms of the benefit of deduction of tax, duty, cess and fee on the one hand with contributions to the employees provident fund,

superannuation fund and other welfare funds on the other. It is further observed that in order to bring about uniformity in allowing deductions to contributions to welfare funds, the amendment was necessitated, while the reason not to extend such deduction appeared to be that the employer should not sit on the collected contributions and deprive the workman of the rightful benefits under the social welfare legislations by delaying payment of contribution to the social welfare fund.

8. Regard being had to the words "due date" as interpreted in Sabari Enterprises case, and affirmed by the Apex Court in ALOM Extrusions Ltd., there can be no more doubt that the assessing officer as well as the revision authority fell in error in disallowing the deduction of Rs.22,91,791/- being the employees' contribution remitted by the petitioner-employerassessee both under the ESI and EPF Act, partly before 31/3/2006 in the financial year concerned and the balance before the filing of the returns under Sec.139(1) of the Act, as extended upto 30/11/2006.

9. In the circumstances, the question is answered in the negative and against the Revenue.

10. In the result this petition is allowed. The order dt. 10/12/2010 - Annex.G of the respondent for the assessment year 2006-07 is quashed and the revision petition filed by the petitioner invoking Sec.264 of the Act - Annex.D, is allowed. Sequentially the order of the assessing officer declining deduction of Rs.22,91,791/- being the employees' contribution remitted by the employer-petitioner, stands modified."

4. Since identical issue was examined by the Hon'ble High Court in assessee's own case, for the impugned assessment year I find no justification to re-examine the issue again. The CIT(Appeals) has decided the issue in terms of judgment of the Hon'ble jurisdictional High Court and I find no infirmity therein. Accordingly, I confirm his order.

5. In the result, the appeal of revenue stands dismissed.

Pronounced in the open court on this 26th day of May, 2017.

Sd/-

(SUNIL KUMAR YADAV)
Judicial Member

Bangalore,
Dated, the 26th May, 2017.

/ Desai Smurthy /

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard file

By order

Assistant Registrar,
ITAT, Bangalore.