

आयकर अपीलीय अधिकरण, “एस.एम.सी” न्यायपीठ, कटक

IN THE INCOME TAX APPELLATE TRIBUNAL “SMC” BENCH CUTTACK

BEFORE SHRI N.S.SAINI, ACCOUNTANT MEMBER

आयकर अपील सं./ITA No.435&436/CTK/2017

(निर्धारण वर्ष / Assessment Year :2011-2012 & 2012-2013)

M/s Kalinga Institute of Training For Security & Consultancy Services, Brit Market Complex, 2 nd Floor, Block-C, O.T. Road, Balasore-756001	Vs.	ITO, Ward-1 Balasore
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAIFX 6549 E		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

निर्धारिती की ओर से /Assessee by : Shri P.R.Mohanty, AR

राजस्व की ओर से /Revenue by : Shri D.K.Pradhan, DR

सुनवाई की तारीख / Date of Hearing : **28/12/2017**

घोषणा की तारीख/Date of Pronouncement **28/12/2017**

आदेश / O R D E R

These two appeals filed by the assessee against the order of the CIT(A), Cuttack, both dated 14.7.2017.

2. The sole issue involved in both the appeals of the assessee is that the CIT(A) erred in confirming the order of the AO disallowing deduction of Rs.5,80,975/- & Rs.44,878/- being EPF & ESI for the assessment year 2011-2012 Rs.3,85,717/- & Rs.11,596/- being EPF & ESI for the assessment year 2012-2013, respectively, deposited belatedly as per the due date as provided in the E.P.F.Act but before the due date of filing of the return u/s.139(1) of the Act.

3. Brief facts of the case are that the AO observed that the assessee has not deposited the employee share of EPF & ESI within the due dates prescribed in the said Act. Therefore, he disallowed the deduction for Rs.5,80,975/- & Rs.44,878/- being EPF & ESI for the assessment year

2011-2012 Rs.3,85,717/- & Rs.11,596/- being EPF & ESI for the assessment year 2012-2013, respectively u/s.36(1)(va) of the Act and added the same to the total income of the assessee.

4. On appeal, the CIT(A) following the decisions in the case of CIT Vs. Gujarat State Road Transport Corporation (2014) 41 taxmann.com 100(Gujarat); CIT Vs. South India Corporation Ltd. (2015) 58 taxmann.com 208 (Kerala); CIT Vs. Merchem Ltd. (2015) 61 taxamnn.com 119 (Kerala) and DCIT, Circle-12, Kolkata Vs. Bengal Chemicals & Pharmaceuticals Ltd. (2011) 10 taxmann.com 26 (Kolkata), confirmed the order of AO.

5. Ld.AR of the assessee relied on the decision of the Hon'ble Delhi High Court in *CIT Vs. AIMIL Limited [2010] 321 ITR 508 (DEL)*, wherein it was 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) of the Act. On the other hand, Id. DR supported the orders of lower authorities.

6. I find 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-HC) 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:—

"(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.* [2009] 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 taxmim.com 141 and Punjab and Haryana High Court in the case of *CIT v. Hernia Embroidery Mills (P.) Ltd.* [2014] 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."

7. 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.

8. In the instant case, it is not in dispute that the contribution to PF and ESI 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 and ESI of Rs.5,80,975/- & Rs.44,878/- for the assessment year 2011-2012 Rs.3,85,717/- & Rs.11,596/- for the assessment year 2012-2013, respectively and allow this ground of appeal of the assessee.

9. In the result, both appeals of the assessee are allowed.

Order pronounced in the open court on this 28/12/2017.

**Sd/-
(N. S. SAINI)**

लेखा सदस्य / ACCOUNTANT MEMBER

कटक Cuttack; दिनांक Dated 28/12/2017

प्र.कु.मि/PKM, Senior Private Secretary

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

1. Appellant-
2. प्रत्यर्थी / The Respondent-
ITO, Ward-1, Balasore
3. आयकर आयुक्त(अपील) / The CIT(A),
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कटक / DR, ITAT, Cuttack
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

(Senior Private Secretary)

आयकर अपीलीय अधिकरण, कटक / ITAT, Cuttack