

**IN THE INCOME TAX APPELLATE TRIBUNAL
PATNA BENCH, PATNA**

Before Sh. N. K. Saini, AM and Sh. Amit Shukla, JM

ITA No. 144/Pat./2017 : Asstt. Year : 2003-04

ITA No. 145/Pat./2017 : Asstt. Year : 2005-06

Income Tax Officer, Ward-2(1), Patna	Vs	M/s Bihar State Food and Civil Supplies Corporation Ltd., Sone Bhawan, 5 th Floor, Birchand Patel Marg, Patna
(APPELLANT)		(RESPONDENT)
PAN No. AACCB0679F		

Assessee by : Sh. Manish Rastogi, Adv.

Revenue by : Smt. Archana Sinha, Sr. DR

Date of Hearing : 09.03.2018

Date of Pronouncement : 09.03.2018

ORDER

Per N. K. Saini, AM:

These two appeals by the department are directed against the separate order each dated 21.07.2017 of the ld. CIT(A)-1, Patna

2. Since, the issue involved is common in both these appeals which were heard together so these are being disposed off by this consolidated order for the sake of convenience and brevity.

3. Common grounds raised in these appeals reads as under:

“1. On the facts and in the circumstances of the case the Ld. CIT(A) erred in holding that the employee’s contribution towards the provident fund stands on the same footing as of employer’s contribution in view of decision of Hon’ble Gujarat High Court in the case of Gujarat State Transport Corporation.”

4. Facts of the case in brief are that the AO made the disallowance u/s 36(1)(va) of the Income Tax Act, 1961 (hereinafter referred to as the Act) for the reasons that the contribution of the employer's & employees to the ESI and EPF was not paid by due dates.

5. Being aggrieved the assessee carried the matter to the Id. CIT(A) who deleted the disallowance made by the AO by observing in paras 5.3 & 5.4 of the impugned order as under:

“5.3 I have gone through the assessment order, facts of the case and submission made by the appellant. Section 2(24)(x) of the Act provides that if any sum received by the assessee from his employees as contributions to any provident fund or any other superannuation fund etc. remains unpaid on or before due date of such payment, the contribution so received would be income of the assessee for the year. This provision of the Act is independent of section 36(1)(va) as well as section 438 of the Act which deal with deductions or expenditure to be allowed on payments made by the assessee. If any contribution made by the employees towards PF or such similar funds, such contribution is in the nature of receipt in the hands of the assessee and thus governed by section 2(24)(x) of the Act. It clearly follows therefrom that if, the appellant had not deposited the contributions received from the employees' before the date of filing of the return, it would have become income his hands. However, on making deposit with the concerned authorities the appellant becomes entitled to deduction under provisions of section 36(1)(va) of the Act and also section 438 of the Act allows for deduction on actual payment. Thus the scheme of the Act is that the assessee is entitled for deduction, if payment have made of the contributions receipt from employees' before the date of filing of return of income. This principal was laid down by the Hon'ble Apex Court in the case of Vinay Cements Limited reported in 166 Taxman 62. Further, section 438 of the Act provides that if, statutory dues are not paid, the same is not entitled for deduction as expenses for the year. However, it has been submitted by the appellant that the statutory dues as mentioned above has been paid well before the date of filing of returns of income.”

5.4 Moreover, the Hon'ble High Court of Patna in the case of M/s Bihar State Warehousing Corporation Ltd. in MA No.302 of 2008 had reversed the decision of Hon'ble ITAT Patna and had allowed appeal for the AY 2003-04 on the similar issue. Respectfully following decision of the Apex Court as well as Jurisdictional High Court M/s Bihar State Warehousing Corporation Ltd. is held that contribution made by employees and statutory dues paid before date of filing of return of income has to be not included as income for the year under appeal in the hands of appellant.”

6. Now the assessee is in appeal.

7. We have considered the submissions of both the parties and carefully gone through the material available on the record. In the present case, the Id. CIT(A) has given a categorical finding that the assessee made the payments of employer's and employees contribution to ESI and EPF before filing the return of income and by following the ratio laid down by the Hon'ble Apex Court in the case of Vinay Cements Ltd. reported at 166 Taxman 62 deleted the disallowance. We, therefore, do not see merit in these appeals of the department.

7. In the result, the appeals of the department are dismissed.

(Order Pronounced in the Court on 09/03/2018)

Sd/-
(Amit Shukla)
JUDICIAL MEMBER

Sd/-
(N. K. Saini)
ACCOUNTANT MEMBER

Dated: 09/03/2018

Subodh

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR