

**INCOM TAX APPELLATE TRIBUNAL –SURAT-BENCH-SURAT  
BEFORE C .M. GARG, JM & O. P. MEENA, AM  
I.T.A No.2121/Ahd/2015**

**निर्धारण वर्ष/Assessment Year : 2012-13**

<b>M/s. Mitali Creation Pvt. Ltd. , Block No. 135, Plot No. 94-105, Ashirwad Industrial Estate Near Venus Mall Tatithaiya Tal-Palsana Surat 393325 PAN: AAGCM 0628 K</b>	<b>V</b>	<b>Income Tax Officer Ward 1(1)(3) Surat</b>
<b>Appellant</b>		<b>Respondent</b>
<b>Assessee by</b>		<b>Shri Ramesh Malapani, CA</b>
<b>Revenue by</b>		<b>Shri P.S. Chaudhary, Sr. D.R.</b>
<b>Date of hearing</b>		<b>05.09.2018</b>
<b>Date of pronouncement</b>		<b>07.09.2018</b>

**ORDER**

**PER O. P. MEENA, AM**

1. This appeal by the Assessee is directed against the order of learned Commissioner of Income tax (Appeals)-1, Surat (in short “the CIT (A)”) dated 29.04.2015 for the Assessment Year 2012-13.
2. **Ground no. 1 relates to confirming the disallowance of Rs.74,360 pertaining payments of PF/ESI paid beyond the due date prescribed under the relevant statutes.**
3. The learned Authorized Representative (the Id. A.R.) submitted the CIT (A) has confirmed the disallowance following the judgement of Hon`ble High Court of Gujarat in the case of CIT v. Gujarat State Road Transport Corporation [2014] 366 ITR 170 (Guj) : 223 Taxman

398 : [2014] 41 taxmann.com 100 (2014) (1) TML 502 -Guj-HC. The appeal filed by GSRTC is presently pending for adjudication before the Hon`ble Supreme Court. The ld. AR has relied on the recent decision of Hon`ble Rajasthan High Court in the case of Pr. CIT v. Rajasthan State Beverage Corporation Ltd. 84 taxmann.com 173 (Raj.) wherein delayed payment of employees contribution to PF is allowed since the same is paid before the due date of filing of return of income. The SLP filed against this decision by the Department has been dismissed by the Hon`ble Supreme Court in Pr. CIT v. Rajasthan State Beverage Corporation Ltd. [2017] 84 taxmann.com 185 (SC). Therefore, it was contended the issue may be decide in favour of the assessee.

**4. *Au contraire***, the learned Departmental Representative submitted that the issue is squarely covered against the assessee by Hon`ble jurisdictional High Court's judgment in the case of CIT vs. Gujarat State Road Transport Corporation, 366 ITR 170 (Guj.), wherein it is categorically held that in the case of delayed deposit of employees contribution to PF, the same will not be deductible in computing income under section 28 of the Act.

**5.** We have heard the rival submissions and perused the relevant material on record. We find that the issue is squarely covered against the assessee by the decision of Hon'ble Gujarat High Court in the case of CIT v. Gujarat State Road Transport Corporation [2014] 366 ITR 170 (Guj) : 223 Taxman 398 : [2014] 41 taxmann.com 100 (2014) (1) TML 502 -Guj-HC, wherein it was held that section 43B does not apply to employees contribution. Only section 2 (24) (x) read with section 36(1)(va) is applicable and therefore, employees contribution is disallowed if not paid within due dates prescribed under relevant Provident Fund /ESI Act. We are, therefore, of the considered opinion that there is no mistake in the orders of lower authorities in making disallowance in the light of the ratio laid down by the Hon'ble Gujarat High Court in the above case (supra). The law so laid down by the Hon'ble jurisdictional High Court is binding on us. The mere fact that an appeal against the said decision is pending before the Hon'ble Supreme Court does not dilute the binding nature of this judicial precedent.

**6.** As regard dismissal of SLP in the case of Pr. CIT v. Rajasthan State Beverages Corporation Ltd [2017] 84 taxmann.com 185 (SC) (supra), it is only elementary that when a SLP is dismissed

by a non-speaking order, it does not constitute a law declared by Hon'ble Supreme court, and as such, it is not binding under Article 141 of the Constitution of India. The Hon`ble Supreme Court in the case of S. Shanmugavel Nadar vs. State of Tamilnadu [2003]; 263 ITR 658 (SC) held that "A summary dismissal by the Supreme Court without laying down any law is not a declaration of law as envisaged in article 141 of the Constitution of India. For declaration of law, there should be a speaking order. A decision which is not express and is not formulated on reasons nor on a consideration of the issue can not be deemed to be a law declared so as to have binding effect under Article 141 of the Constitution of India." Following the above decision and in conformity with this principle, it was laid down in the case of CIT vs. KM Jagannathan 180 ITR 191 (Mad) that dismissal of special leave petition by the Supreme Court cannot be construed as affirmation of the decision against which special leave was sought. In the case of Hindustan Tea Trading Company Ltd. vs. CIT 263 ITR 289, 294 (Cal), it was reiterated that a decision becomes binding as a precedent only when the court decides a particular question of law or lays down the ratio through a conscious adjudication. Agreement with the finding of fact

by the lower court without adverting to the ratio laid down in the finding does not create a precedent. The authority, for this proposition, is contained in a series of judgments of Hon'ble Supreme Court, including, inter alia, in the cases of State of Manipur vs. Thingujam Brojen Meetai, (1996) 9 SCC 29; Om Prakash Gargi v. State of Punjab, (1996) 11 SCC 399 and Sun Export Corporation v. Collector of Customs, AIR 1997 SC 2658.

**7.** The decision of the Hon'ble jurisdictional High Court is against the assessee, which has binding precedent over the tribunal functioning under its jurisdiction. We, therefore, see no legally sustainable merit in the submissions of the assessee and, respectfully following the judgment of Hon'ble jurisdictional High Court in the case of CIT v. Gujarat State Road Transport Corporation [2014] 366 ITR 170 (Guj) : 223 Taxman 398 : [2014] 41 taxmann.com 100 (2014) (1) TML 502 -Guj-HC (supra). In the light of above discussion, the grounds of appeal of the assessee is being devoid of any merit, is therefore, dismissed.

**8. Ground No. 2 relates to charging of interest u/s. 234B of the Act.**

9. We are of the view that this ground is consequential in nature, however, we make it clear that the charging of interest is mandatory as held by Hon`ble Supreme Court in the case of Anjum M. H. Ghaswala 252 ITR 1 (SC). Therefore, it is upheld subject to consequential relief if any.

10. In the result, the appeal of the assessee is dismissed.

11. Order pronounced in the open court on 07.09.2018

**Sd/-**  
**(C.M. GARG)**  
**JUDICIAL MEMBER**

**Sd/-**  
**(O.P.MEENA)**  
**ACCOUNTANT MEMBER**

Surat: Dated: 07.09.2018/opm

Copy of order sent to- Assessee/AO/Pr. CIT/ CIT (A)/ ITAT  
(DR)/Guard file of ITAT.

**By order**

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**Assistant Registrar, Surat**