

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

**Before Sh. N. S. Saini, Accountant Member
And**

Sh. N. K. Choudhry, Judicial Member

ITA No. 644/Asr./2017 : Asstt. Year : 2013-14

ITA No. 645/Asr./2017 : Asstt. Year : 2014-15

Asstt. Commissioner of Income Tax, Circle-3, Srinagar	Vs	M/s Jammu & Kashmir Tourism Development Corporation, TRC, Srinagar
(APPELLANT)		(RESPONDENT)
PAN No. AABCJ5754G		

Assessee by : Sh. Vasu Gupta, CA

Revenue by : Ms. Shivani Bansal, DR

Date of Hearing :21.02.2019

Date of Pronouncement : 19.03.2019

ORDER

Per N. S. Saini, Accountant Member:

These are the appeals filed by the assessee against the order of CIT(A), J&K, Jammu for the assessment years 2013-14 and 2014-15 both dated 29.06.2017.

2. The common issue involved in both the appeals is that the CIT(A) erred in confirming the addition of Rs.1,14,77,766/- in assessment year 2013-14 and Rs.1,05,92,304/- in the assessment year 2014-15 on account of deduction u/s 36(1)(va) of the Income Tax Act, 1961 made by the AO by disallowing employers contribution to provident fund.

3. The brief facts of the case are that the Assessing Officer observed that the assessee company had deposited the

contribution to provident fund of Rs.32,81,478/- and contribution to ESI of Rs.79,96,288/- beyond the due date specified in the provident fund and ESI Act in the assessment year 2013-14. Similarly, in the assessment year 2014-15, the assessee had deposited the employees share of provident fund of Rs.1,05,92,304/- beyond the due date prescribed under the Provident Fund Act. Therefore, he disallowed deduction for the same.

4. On appeal, the CIT(A) confirmed the action of the AO.

5. Before us, the AR of the assessee relied on the decision of Amritsar Bench of the Tribunal in the case of DCIT Vs M/s Jamkash Vehicleades Pvt. Ltd. in ITA No. 304/Asr./2010 for the assessment year 2006-07, order dated 25.09.2012 where it was held as under:

"3. The brief facts in grounds No. 1 to 4 of the Revenue are that the assessee has deposited the Employees share of Provident Fund before the due date of filing the Return of Income but after specified date under the Provident Fund Act. The AO accordingly added the said amount of Rs.4,96,305/- to the income of the assessee which was deleted by the Id. CIT(A) following the decision of the ITAT, Amritsar Bench in the case of ACIT Range-II, Jalandhar vs. M/s. Proxima Steel Forge P. Ltd. Jalandhar in ITA No.280(Asr)/2008, on the identical issue.

4. We have heard the rival contentions and perused the facts of the case. We concur with the views of the Ld. CIT(A) and the issue before us is identical to the facts of the case of M/s. Proxima Steel Forge P. Ltd. Jalandhar (supra) and therefore, the Ld. CIT(A) has rightly deleted the addition made by the A.O. We find no infirmity in

his order and the same is upheld. Thus, grounds No. 1 to 4 of the Revenue are dismissed."

6. Further, he relied on the decision of Amritsar Bench in the case of ACIT Vs M/s Proxima Steel Forge P. Ltd. in ITA No. 280/Asr./2008 for the assessment year 2004-05, order dated 12.09.2008 where the Tribunal deleted the disallowance by observing as under:

"4. We have heard both the patties and perused the material placed on record. The -contention of the Ld. DR is that the in this case Section 36(1)(va) of the Act is applicable which reads as follows:

"36(1) The deductions provided for in the following clauses shall be allowed in respect of the matters dealt with therein, in computing the income referred to in section 28-

- (i)*
- (ia)*
- (ib).....*
- (ii).....*
- (ia).....*
- (hi).....*
- (iv).....*
- (v).....*

(va) any sum received by the assessee from any of his employees to which the provisions of sub-clause (x) of clause (24) of section 2 apply, if such sum is credited by the assessee to the employee's account in the relevant fund or funds on or before the due date."

The argument of the Ld. DR is misconceived in view of the provisions of section 43B of the Act. Section 43B starts in non-obstante clause which reads as follows:

"43B. Notwithstanding anything contained in any other provision of this Act, a deduction otherwise allowable under this Act in respect of—

(a) any sum payable by the assessee by way of tax, duty, cess or fee, by whatever name called, under any law for the time being in force, or]

(b) any sum payable by the assessee as an employer by way of contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of employees, [or]

(c) any sum referred to in clause (ii) of sub-section (1) of section 36.1 [or]

(d) any sum payable by the assessee as interest on any loan or borrowing from any public financial institution [or a State financial corporation or a State industrial investment corporation], in accordance with the terms and conditions of the agreement governing such loan or borrowing [, or]

(e) any sum payable by the assessee as interest on any [loan or advances] from a scheduled bank in accordance with the terms and conditions of the agreement governing such loan [or advances],] [or]

(f) any sum payable by the assessee as an employer in lieu of any leave at the credit of his employee,]

shall be allowed (irrespective of the previous year in which the liability to pay such sum was incurred by the assessee according to the method of accounting regularly employed by him) only in computing the income referred to in section 28 of that previous year in which such sum is actually paid by him:

*Provided that nothing contained in this section shall apply in relation to any sum [***] which is actually paid by the assessee on or before the due date applicable in his case for furnishing the return of income under sub-section (1) of section 139 in respect of the previous year in which the liability to pay such sum was incurred as aforesaid*

and the evidence of such payment is furnished by the assessee along with such return.

Since second proviso which reads as follows;

"Provided further that no deduction shall, in respect of any sum referred to in clause (b), be allowed unless such sum has actually been paid in cash or by issue of a cheque or draft or by any other mode or before the due date as defined in the Explanation below clause (va) of sub-section (1) of section 36, and where such payment has been made otherwise than in cash, the sum has been realised within fifteen days from the due date."

deleted by Finance Act, 2003 w.e.f. 1.4.2004 and the assessee is required to make payment before furnishing return of income as per sub-section (1) of Section 139 of the Income-tax Act. In the present case, the due date for filing the return of income was 31.10.2004 and the payment of E.P.F. was made before 31.10.2004 as evidenced from the chart shown in the facts of the case. As such, the assessee has made the payment within due date as mention in the proviso to section 43B of the Act and the assessee is entitled for deduction and it cannot be treated as income of the assessee. Hence, the Ld. CIT(A) was justified in allowing the ground of the assessee. We also place reliance on the judgment of Hon'ble Uttarakhand High Court in the case of CIT Vs. Desli Rakshak Aushdhalaya Ltd. reported in (2008) 218 CIR 7, wherein it has been held as under:

"Held, When Section 43B was incorporated in the I.T. Act, 1961, and contained the second proviso, the intention of the legislature appears to be that the deduction should be given only if the deposits are made within due dates under the enactment under which the same were realised from employees and required to be deposited so that that employer may not earn interest etc. in his own account and deprive the Government of the

same. However, later the legislature appears to have realized that whenever such amount is deposited under the Government treasury, in any case it cannot be said to be taxable income of the employer/assessee, and has to be deducted. That might be the reason due to which the legislature omitted the second proviso to section 43B through Finance Act, 2003, which came into force w.e.f. 1st April, 2004. Expressly it is not provided in the Finance Act, 2003, that the deletion is retrospective. Therefore, the Court has to see whether impliedly the deletion is retrospective or not? The amendment which simply removes the ambiguity, and curative in nature, impliedly has retrospective effect. The deletion of second proviso to section 43B is retrospective in nature. That being so, it cannot be said that the Tribunal has committed any error of law in deleting the addition of Rs. 2,98,924/- made by the AO, which was the amount deposited by the assessee on account of provident fund deduction of its employees, in the Government account."

In view of the above, we dismiss the appeal of the Revenue."

7. He further relied on the decision of Hon'ble Punjab & Haryana High Court in the case of CIT Vs Mark Auto Industries Ltd. (2013) 358 ITR 43 (P&H) where it was held that the assessee was entitled deduction in respect of employers and employees contribution to ESI if the same was deposited before the due date of filing of return u/s 139(1) of the Act.

8. Further, reliance was placed on the decision of Hon'ble Allahabad High Court in the case of Sagun Foundry Pvt. Ltd. Vs CIT (2017) 145 DTR 265 (All.) where it was held that the assessee would be entitled to deduction for employer and employees contribution to provident fund if the same was paid before the due date of filing of return of income u/s 139(1) of

the Act. Hence, it was prayer that following the above decision, the disallowance made should be deleted.

9. The DR relied on the orders of the lower authorities.

10. We have heard the rival submissions and perused the materials available on the record. The undisputed facts of the case are that the Assessing Officer disallowed deduction for employer and employees contribution to provident fund of Rs.32,81,478/- and ESI of Rs.79,96,288/- in the assessment year 2013-14 and deduction for employees contribution to Provident Fund of Rs.1,05,92,304/- in the assessment year 2014-15 for the reason that they were not deposited with the provident fund and ESI authorities within the due date prescribed under the respective Act.

11. The AR of the assessee submitted by relying on the various decisions of the Tribunal and High Courts quoted above that if the contribution to provident fund and ESI was deposited by the assessee before the due date for filing of return of income u/s 139(1) of the Act then no disallowance for the same was warranted u/s 43B or 36(1)(va) of the Act.

12. The DR has relied on the orders of the lower authorities and could not show any good reason not to follow the above quoted decision of the Tribunal and Hon'ble P&H High Court. We, therefore, set aside the orders of the lower authorities and vacate the disallowance of deduction for employer and employees contribution to provident fund of Rs.32,81,478/- and to ESI of Rs.79,96,288/- in the assessment year 2013-14 and employees provident fund for Rs.1,05,92,304/- in

assessment year 2014-15 and allow the ground of appeal of the assessee.

13. In the result, the appeals of the assessee are allowed.
(Order Pronounced in the Open Court on 19/03/2019)

Sd/-
(N. K. Choudhry)
Judicial Member

Sd/-
(N. S. Saini)
Accountant Member

Dated: 19/03/2019

Subodh

Copy forwarded to:

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

ASSISTANT REGISTRAR