

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

**BEFORE SHRI V. DURGA RAO, HON'BLE JUDICIAL MEMBER &
SHRI D.S. SUNDER SINGH, HON'BLE ACCOUNTANT MEMBER**

**ITA No. 285/VIZ/2019
(Asst. Year : 2015-16)**

Arinana David Raju,
D.No. 43-14-17,
Subbalakshmi Nagar,
Dondaparthi,
Visakhapatnam

vs. ACIT, Circle-4(1),
Visakhapatnam.

PAN No. AEDPA 1853 N
(Appellant)

(Respondent)

Assessee by : Shri R. Venkata Raman, CA.

Department By : Shri P.Srinivasa Murthy, Sr.DR

Date of hearing : 16/07/2019.

Date of pronouncement: 19/07/2019.

ORDER

PER V. DURGA RAO, JUDICIAL MEMBER

This appeal by the assessee is directed against the order of Commissioner of Income Tax (Appeals)-6, Hyderabad, dated 28/02/2019 for the Assessment Year 2015-16.

2. Facts of the case, in brief, are that assessee is an individual deriving income from business of labour contracts, filed his return of income declaring total income of Rs. 3,21,79,780/-. The return of income filed by the assessee was processed u/sec. 143(1) of

the Income Tax Act, 1961 (hereinafter referred to as 'Act'). Subsequently case of the assessee was selected for scrutiny and assessment was completed u/sec. 143(3) of the Act. In the assessment order, the Assessing Officer has noted that employee's contribution to ESI & EPF of Rs. 11,85,587/- was remitted belatedly. Therefore, the Assessing Officer has disallowed the same on the ground that the assessee has not remitted within the prescribed due date as per the relevant Act, hence, he treated the same as deemed income of the assessee under section 2(24)(x) r.w.s. 36(1)(va) of the Act. Accordingly, he added back to the returned income.

3. On appeal before the Id. CIT(A), it was submitted that though the assessee has paid the amounts belatedly, the contribution received from the employees has been paid to the Government account before due date of filing of the return as per section 139(1) of the Act. The Id.CIT(A) by following the various judicial precedents including the decision of the coordinate bench of the Ahmadabad tribunal in the case of *Ocean Agro (India) Ltd. Vs. DCIT* [(2018) 172 ITD 157], dismissed the assessee's appeal.

4. On appeal before us, Id.AR has submitted that the issue involved in this appeal is squarely covered by the decision of the coordinate bench of the tribunal in the case of *DCIT Vs.*

M/s. Eastern Power Distribution Company of A.P. Ltd., in ITA No. 609/VIZ/2014, dated 29/07/2016, wherein the Tribunal has discussed the issue in detail, and prayed that same may be followed.

5. On the other hand, Id. Departmental Representative has relied on the orders of the authorities below.

6. We have heard both the sides, perused the material available on record and orders of the authorities below.

7. The only issue involved in this appeal is whether the contribution received from the employees paid before due date of filing of the return, is allowable or not. In this context, the ITAT, Visakhapatnam Bench in the case of *M/s. Eastern Power Distribution Company of A.P. Ltd.*, (*supra*) held the issue as under:-

"5. We have heard both the parties, perused the materials available on record and gone through the orders of the authorities below. The A.O. made additions towards belated payment of employees' contributions to PF. According to the A.O., employees' contribution to provident fund is deductible under the provisions of section 36(1)(va) of the Act, if the same is paid on or before the due date specified under the provident fund Act. The A.O. further was of the opinion that in view of the clear provisions of section 2(24)(x) r.w.s. 36(1)(va) of the Act, any recovery from employees towards provident fund contribution is deemed to be income of the assessee, if the employer not paid the same to the provident fund account of the employee within due date specified under the provisions of PF Act. It is the contention of the assessee that second proviso to section 43B of the Act provides that no deduction shall be allowed unless such sum is actually been paid on or before due date as specified in explanation to 36(1)(va) of the Act which was omitted by the Finance Act, 2003 w.e.f. 1.4.2004 and accordingly, there was no special provision regarding employees' contribution to PF. It is further contended that as per the

amended provisions of section 43B of the Act, any sum payable by the assessee as an employer by way of contribution to PF shall be allowed, if the same is paid on or before the due date of filing of return of income u/s 139(1) of the Act.

6. *The only issue to be resolved is whether the assessee would be entitled to claim deduction for the employees' contribution made to PF after the due date prescribed under the PF Act, but before the due date prescribed for filing of income tax return in the light of the provisions contained in section 36(1)(va) of the Act and section 43B(b) of the Act. It is the contention of the assessee that there is no distinction between employer and employee contribution after omission of second proviso of section 43B of the Act by Finance Act, 2003 w.e.f. 1.4.2004. We find force in the arguments of the assessee for the reason that there is no difference between employees and employer contribution under the PF Act. Section 6 of Provident Fund Act provides for contribution and the manner in which such contribution shall be made. Paragraph 30 of the PF Scheme provides for payment of contributions. As per the said scheme, the employer at the first instance shall make the total contribution including employees' share. Paragraph 32 provides for recovery of member share of contribution and as per the scheme, the employer can recover the employees' share from the wages paid to the employee. Therefore, as per the PF Act and scheme of contributions, the contributions means and include both employees' and employer's share. Similarly, section 2(c) of the Provident Fund Act defines the contribution to mean a contribution payable in respect of a member under the scheme or the contribution payable in respect of an employee to whom the scheme applies. There is a prescribed mode of payment of contributions under the PF Act. Under the said Act, the employer shall contribute both employees and employer share along with administrative charges before the due date specified under the PF Act. The Act prescribed only one due date for depositing the contribution i.e. 15th of subsequent month with the grace period of 5 days which indicates that there is no difference between employee and employer contribution. If the legislature intends to differentiate employees and employer contribution, then there would have been two due dates like in the case of Income Tax Act. Therefore, from the above, it is clear that the Provident Fund Act does not differentiate employees and employer contribution and contribution means both employees and employer contribution under the PF scheme.*

7. *Section 43B of the Act provides for certain deductions to be allowed only on actual payment basis. Sub clause (b) of section 43B of the Act covers 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 the employees. The proviso to section provides that any sum paid by the assessee on or before the due date of furnishing return of income u/s 139(1) of the Act, then no disallowance can be made under the provisions of section 43B of the Act. A careful consideration of section 43B of the Act, it is clear that an extension is*

granted to the assessee to make the payment of PF contributions or any other fund till the due date of furnishing return of income u/s 139(1) of the Act. Therefore, in our opinion, there is no difference between employees and employer contribution to PF and if such contribution is made on or before the due date of furnishing return of income u/s 139(1) of the Act, then deduction is to be allowed under the provisions of section 43B of the Act.

8. *The Hon'ble Karnataka High Court, in the case of Essae Teraoka (P) Ltd. Vs. DCIT 366 ITR 408 took the view that the word contribution occurring in section 43B of the Act would include employees' contribution to PF in the light of the definition of the word contribution as per the provisions of section 2(c) of the PF Act. As per the said section, contribution would mean both employer's contribution and employees' contribution. Accordingly, it was held that the provisions of section 43B of the Act allowing deduction for payment made before the due date of filing of Income Tax return cannot be ignored. Similarly, the ITAT, Hyderabad Tribunal in the case of Tetra Soft (India) Pvt. Ltd. Vs. ACIT (2015) 40 ITR (Trib) 470 held that when assessee remitted employees' contribution to PF within due date of filing return of income u/s 139(1) of the Act, amount of employees' contribution to PF cannot be disallowed. Similar view was upheld by the Chennai bench of the ITAT, in the case of ACIT Vs. Farida Shoes Pvt. Ltd. (2016) 46 CCH 29. The coordinate bench held that if assessee had not deposited employees' contribution towards provident fund up to the due date as prescribed under relevant statute, but before due date of filing of return no disallowance could be made in view of the provisions of section 43B of the Act. In the case of CIT Vs. Udaipur Dugdh Utpadak Sahakari Sangh Ltd. 35 Taxman 616, the Hon'ble High Court of Rajasthan, after referring to the apex court decision in the case of CIT Vs. Alom Extrusions Ltd. 319 ITR 306 & CIT Vs. Vinay Cement Ltd. held that the deductions should be allowed for the payment of employees' contribution made before the due date of filing of return. Similarly, in the case of CIT Vs. State Bank of Bikaner, the Hon'ble Rajasthan High Court held that contribution paid after the due date under the respective Act, but before filing the return of income u/s 139(1) of the Act cannot be disallowed u/s 43B of the Act and or u/s 36(1)(va) of the Act.*

9. *The Ld. D.R. relied upon the decision of Hon'ble High Court of Kerala, in the case of CIT vs. Merchem Ltd, reported in (2015) 378 ITR 443 and submitted that employees' contribution to provident fund is allowed as deduction, if the same is deposited on or before the due date specified under the provisions of provident fund Act. The D.R. also relied upon the decision of Gujarat High Court, reported in (2014) 366 ITR 170, wherein the Hon'ble Gujarat High Court held that since assessee had not deposited said contribution to respective fund account on the date as prescribed in explanation to section 36(1)(va) of the Act, disallowance made by the A.O. was just and proper. Though, the D.R. relied upon certain judicial precedents which are in favour of the revenue, in view of the decision of*

Hon'ble Supreme Court, in the case of CIT Vs. M/s. Vegetables Products Ltd. reported in 88 ITR 192, wherein the Hon'ble Supreme Court held that if two reasonable constructions of a taxing provision are possible that construction which favours the assessee must be adopted, therefore, by respectfully following the decision of Supreme Court, when divergent views are expressed by different judicial forums, we prefer to follow the views expressed by the Courts which are in favour of the assessee.

10. Considering the facts and circumstances of this case and also following the judicial precedents as discussed above, we are of the view that there is no distinction between employees' and employer contribution to PF, and if the total contribution is deposited on or before the due date of furnishing return of income u/s 139(1) of the Act, then no disallowance can be made towards employees' contribution to provident fund. The CIT(A) after considering the relevant details rightly deleted the additions made by the A.O. We do not see any reasons to interfere with the order of the CIT(A). Hence, we inclined to uphold the CIT(A) order and dismiss the appeal filed by the revenue."

8. Therefore, respectfully following the decision of the coordinate bench of this tribunal in the case of *M/s. Eastern Power Distribution Company Ltd.* (supra), we set aside the order passed by the Id. CIT(A) and direct the Assessing Officer to allow the claim of the assessee. Thus, this appeal filed by the assessee is allowed.

9. In the result, appeal filed by the assessee is allowed.

Order Pronounced in open Court on this 19th day of July, 2019.

Sd/-
(D.S. SUNDER SINGH)
Accountant Member

sd/-
(V. DURGA RAO)
Judicial Member

Dated : 19th July, 2018.

vr/-

Copy to:

1. *The Assessee - Arinana David Raju, D.No. 43-14-17, Subbalakshmi Nagar, Dondaparthu, Visakhapatnam*
2. *The Revenue - ACIT, Circle-4(1), Visakhapatnam.*
3. *The Pr.CIT-2, Visakhapatnam.*
4. *The CIT(A-6, Hyderabad.*
5. *The D.R., Visakhapatnam.*
6. *Guard file.*

By order

(VUKKEM RAMBABU)
Sr. Private Secretary,
ITAT, Visakhapatnam.