IN THE INCOME TAX APPELLATE TRIBUNAL
LUCKNOW BENCH 'SMC', LUCKNOW

BEFORE SHRI T. S. KAPOOR, ACCOUNTANT MEMBER

I.T.A. No.289/Lkw/2019
Assessment Year:2014-15

M/s Axis Motors Pvt. Ltd., 127W-1, 68-69, Saket Nagar, Kanpur. PAN:AAHCA 0208 J	Vs.	Dy.C.I.T.-6, Kanpur.
(Appellant)		(Respondent)

Appellant by	Shri P. K. Kapoor, C. A.
Respondent by	Smt. Alka Singh, D.R.
Date of hearing	29/07/2019
Date of pronouncement	31/07/2019

O R D E R

This appeal has been filed by the assessee against the order of learned CIT(A)-II, Kanpur dated 07/03/2019 pertaining to assessment year 2014-15.

2. The assessee has taken various grounds of appeal however, the crux of grounds of appeal is the action of learned CIT(A) by which he has confirmed a penalty amounting to Rs.25,600/- which the Assessing Officer had imposed u/s 271(1)(c) of the Act.

3. Learned A. R., explaining the facts of the case, submitted that Assessing Officer, during the assessment proceedings, had observed that the assessee had deposited certain employees contribution to PF and ESI beyond the prescribed period as provided in the relevant act and therefore, he disallowed the same. It was submitted that the assessee did not file appeal against the order of the Assessing Officer as the amount was very

small. He further submitted that non filing of the appeal against the assessment order does not mean that assessee was liable for penalty u/s 271(1)(c) of the Act as the issue was entirely covered in favour of the assessee as the assessee had deposited the amount before filing of return of income and therefore, as per the judgment of Hon'ble Allahabad High Court in the case of Sagun Foundry (P.) Ltd. vs. CIT in IT Appeal No. 87 of 2006, the addition was not warranted and therefore, the penalty was also not warranted. Regarding the date of deposit of PF and ESI, Learned A. R. took us to the annexure forming part of audit report u/s 44AB of the Act and our specific attention was invited to page No. 1 where the charts showing the due date of deposit and actual date of deposits was placed. In view of the above, it was prayed that the penalty should be deleted.

4. Learned D. R., on the other hand, supported the order of the authorities below.

5. I have heard the rival parties and have gone through the material placed on record. I find that it is an undisputed fact that penalty was imposed for delay in making payment of EPF and ESI. It is also an undisputed fact that such deposits were made before the due date of filing of income tax returns, as is apparent from page 1 of the paper book where the last date of making payment is 17/04/2014 whereas the due date for filing the income tax return was 31/10/2014. Hon'ble Allahabad High Court in the case of Sagun Foundry (P.) Ltd. vs. CIT in IT Appeal No. 87 of 2006, vide judgment dated 21/12/2016, has held that if the assessee deposits the ESI and EPF before the due date of filing of return of income, the disallowance u/s 36(1)(va) cannot be made. The operative part of the judgment of Hon'ble Allahabad High Court, as contained from para 17 to 30, are reproduced below:

"17. We find that with respect to employees contribution to Provident Fund, as to whether disallowable or not with reference to Section 36(1)(va) read with Section 43B, a similar question came up for consideration before Gujrat High Court in ***Commissioner of Income-Tax Vs Gujrat State Road Transport Corporation, (2014) 366 ITR 170****. Therein Assessee collected Rs. 51,06,02,712/- from its employees towards provident fund contribution but deposited Rs. 21,16,61,582/- with provident fund trust. Thus there was a short fall of Rs. 24,89,41,130/-. This amount of short fall was treated by Assessing Officer as income of Assessee vide Section 2(24)(x) read with Section 36(1)(va) of Act 1961. Assessing Officer also added Rs. 1,93,55,580/- being the amount of short fall towards employers contributory provident fund and disallowed the same under Section 43B of Act 1961. He also disallowed the said amount of Rs. 1,93,55,580/- from expenses claimed by Assessee for the A.Y. in question i.e. 2005-06 as per provisions under Section 43B. Dissatisfied with assessment order, Assessee preferred appeal before CIT(A) who vide order dated 25.06.2009 partly allowed the same and deleted disallowance of Rs. 24,89,41,130/- (short fall in employees contribution to provident fund) and Rs. 1,93,55,580/- (short fall in employers contribution to provident fund) observing that employees contribution/employers contribution was deposited before filing Return under Section 139(1) of Act 1961 for the relevant period. Revenue, in its turn, preferred appeal before Tribunal. Relying on judgment in* ***Commissioner of Income-Tax Vs Alom Extrusions Ltd. (supra)****, Tribunal dismissed appeal and confirmed order passed by CIT(A). That is how matter came before High Court in appeal. Court considered following question, posed in para 7.01, reads as under:-*

> *"Short question which is posed for consideration of this court is with respect to the disallowance of the amount being the employees' contribution to the PF account/ESI contribution which admittedly which the concerned assessee did not deposit with the PF Department/ESI Department within due date under the PF Act and/or the ESI Act."*

18. Gujrat High Court referred to Section 2(24)(x) and found that any sum received by Assessee (employer) from his employees as contributions to any provident fund or superannuation fund or any fund set up under Act, 1948, or any other fund for welfare of such employees, constitute income. However, Section 36 of Act 1961 provides for deduction in computing income referred to in Section 28. The relevant provision of Section 36 applicable to the case before Gujrat High Court was Section 36(1)(va) with which we are also concerned. It entitles an Assessee for deduction in computing income

referred to in Section 28 with respect to any sum received by Assessee (employer) from his employee to which Section 2(24)(x) apply, if such sum is credited by Assessee to employees accounts in the relevant fund before due date i.e. date prescribed in the relevant statute applicable to the concerned fund. Court also noticed that Section 43B is in respect to certain deductions and applies only on actual payment. It held that amendment was made by deletion of Second Proviso of Section 43B only, but no corresponding amendment was made under Section 36(1)(va). It said:

> *"It is required to be noted that as such there is no amendment in Section 36(1)(va) and even the Explanation to Section 36(1)(va) is not deleted and is still on the statute and is required to be complied with. Merely because with respect to the employer's contribution the second proviso to Section 43B which provided that even with respect to the employer's contribution (Section 43B(b)), the Assessee was required to credit the amount in the relevant fund under the PF Act or any other fund for the welfare of the employees on or before the due date under the relevant Act, is deleted, it cannot be said that Section 36(1)(va) has been deleted and/or amended."*

19. That is how Gujrat High Court held that Section 43B would not be attracted in a case where dispute relates to employees contribution only. Section 43B would be confined only to employers contribution. It further said:

> *"Therefore, with respect to the employees contribution received by the assessee if the assessee has not credited the said sum to the employees' account in the relevant fund or funds on or before the due date mentioned in the Explanation to Section 36(1)(va), the assessee shall not be entitled to deductions of such amount in computing the income referred to in Section 28 of the Act."*

20. Gujrat High Court distinguished judgment of ***Commissioner of Income-Tax Vs Alom Extrusions Ltd. (supra)*** *on the ground that therein actual dispute relates to employers' contribution and whether amendment in Section 43B by Finance Act, 2003 would operate retrospective or not, Supreme Court had no occasion to consider deduction with reference to Section 36(1)(va). For the same reason Gujrat High Court dissented with the judgments of Rajasthan High Court in* ***Commissioner of Income-Tax Vs Udaipur Dugdh Utpadak Sahakari Sangh Ltd., (2014) 366 ITR 163,*** *Punjab & Haryana High Court in* ***Commissioner of Income-Tax Vs Hemla Embroidery Mills P. Ltd., (2014) 366 ITR 167,*** *Himachal Pradesh High Court in* ***Commissioner of***

Income-Tax Vs Nipso Ployfabriks Ltd., (2013) 350 ITR 327 *and Karnataka High Court in* ***Commissioner of Income-Tax Vs Sabri Enterprises, (2008) 298 ITR 141****.*

2.1 Karnataka High Court had an occasion to consider, whether it should dissent with the view taken in the earlier judgments and follow the view taken by Gujrat High Court in ***Commissioner of Income-Tax Vs Gujrat State Road Transport Corporation (supra)*** *and this occasion came in* ***Essae Teraoka P. Ltd. Vs Deputy Commissioner of Income-Tax, (2014) 366 ITR 408****. Dispute relates to A.Y. 2008-09. Assessee filed Return on 26.09.2008. Return was processed under Section 143(1) and thereafter on scrutiny, notice under Section 143(2) was issued. Assessing Officer completed assessment by order dated 24.12.2010 under Section 143(3) disallowing Rs. 12,51,737/- under Section 36(1)(va) and also disallowing Rs. 1,04,621/- under Section 14A read with Rule 8D. In appeal, CIT (A) reversed findings of Assessing Officer but on appeal preferred by Revenue, Tribunal restored Assessing Officer's order and that is how matter came to Karnataka High Court. The question up for consideration was, "whether Tribunal was justified in affirming finding of Assessing Officer and denying Assessee's claim of deduction of employees contribution to PF/ESI alleging that the payment was not made by appellant in accordance with the provisions of Section 36(1)(va) of Act 1961." The Assessee's counsel relied on earlier judgment of Karnataka High Court in* ***Commissioner of Income-Tax Vs Spectrum Consultants P. Ltd., (2014) 2 ITR-OL 622*** *while counsel for Revenue attempted to pursue to take a different view following decision of Gujrat High Court. The Division Bench judgment delivered by Hon'ble Dilip B. Bhosale, (as his lordship then was) held, if the contribution of employees fund is deposited within due date the Assessee is straightaway entitled for deduction under Section 36(1)(va). However Section 43B provides for certain deductions allowable only on actual payment. It gives an extension to the employer to make payment of contribution to provident fund or any other fund, till due date applicable for furnishing of Return under Section 139(1) of Act 1961, in respect of previous year in which liability to pay such sum was incurred, and evidence of such payment is furnished by Assessee along with such Return. Court then said:*

> *"In short,* ***this provision states, notwithstanding anything contained in any other provision contained in this Act****, A deduction otherwise ALLOWABLE in this Act in respect of ANY sum PAYABLE by the ASSESSEE AS AN employer by WAY of contribution to ANY fund such AS provident fund shALL be ALLOWed if it is PAId on or before the due dATE AS CONTEMPLATED under Section 139(1) of the Income-TAX Act.* ***This provision***

> ***has nothing to do with the consequences****, provided for under the PF Act/PF Scheme/ESI Act, for not depositing the "contribution" on or before the due dates therein."*

22. It also said that the word "contribution" used in clause (b) of Section 43B of Act 1961 means the contribution of employer and employee, both, and that being so, if contribution is deposited on or before due date for furnishing Return of income under sub-section (1) of Section 139 of Act 1961, employer is entitled for deduction.

*23. Though in a short judgment, but Punjab & Haryana High Court in **Commissioner of Income-Tax Vs Hemla Embroidery Mills (P.) Ltd., (supra)** not only followed **Commissioner of Income-Tax Vs Alom Extrusions Ltd. (supra)** but also its own earlier judgment in **Commissioner of Income-Tax Vs Rai Agro Industries Ltd., (2011) 334 ITR 122**, to hold that Section 43B shall apply to both 'contributions' i.e. employers' and employees'.*

*24. Kerala High Court in recent judgment in **Commissioner of Income-Tax Vs Merchem Ltd., (2015) 378 ITR 443**, has followed the decision of Gujrat High Court in **Commissioner of Income-Tax Vs Gujrat State Road Transport Corporation (supra)** and dissented with the otherwise judgments of Rajasthan High Court in **Commissioner of Income-Tax Vs State Bank of Bikaner and Jaipur, (2014) 363 ITR 70**, Karnataka High Court in **Commissioner of Income-Tax Vs Spectrum Consultants India P. Ltd. (supra)** and Bombay High Court in **Commissioner of Income-Tax Vs Ghatge Patil Transports Ltd., (2014) 368 ITR 749**.*

*25. Before following a particular view when there is divergence in views of different High Courts, we find it appropriate to examine Supreme Court judgment in **Commissioner of Income-Tax Vs Alom Extrusions Ltd. (supra)** to find out whether it can be confined only in respect to employers' contribution or is applicable to both 'contributions', whether by employer or employee.*

*26. The question, whether benefit under Section 43B, as a result of amendment of Finance Act, 2003, is retrospective or not, came to be considered in **Commissioner of Income-Tax Vs Alom Extrusions Ltd. (supra)**. Court considered the intent, purpose and object in the historical back drop of insertion of Section 43B and its progress by way of various amendments. Referring Section 2(24)(x) it said, income is defined under Section 2(24) which includes profits and gains. Further in clause (x) of Section 2(24) any sum received by Assessee from employees as 'contributions' to any provident fund/superannuation fund or any fund set up under Act 1948, or any*

other fund for welfare of such employees constitute income'. This is the reason why every Assessee/Employer was entitled to deduction even prior to April, 1, 1984, keeping books on mercantile system of accounting, as a business expenditure, by making provision in his books of account in that regard. Assessee was capable of keeping money with him and just by mentioning in accounts, was able to claim deduction as business expenses. Section 43B was inserted to check this practice and it resulted in discontinuing mercantile system of accounting with regard to tax, contributions etc. With induction of Section 43B an Assessee could claim deduction on actual payment basis. By Finance Act, 1988 Parliament inserted first proviso w.e.f. 01.04.1988 which inter alia provides that any sum payable by Assessee by way of tax, duty, cess or fee, if payment is made after closing of accounting year but before date of filing of Return under Section 139(1), Assessee would be entitled to deduction on actual payment basis. This proviso did not include within its ambit, contributions under labour welfare statutes. By Finance Act, 1988, Second Proviso thus Second proviso was further amended by Finance Act, 1989 w.e.f. 01.04.1989.

27. Court held that Assessee/employer thus would be entitled to deduction only if contribution stands credited on or before due date given in the Act 1952 or Act 1948. Second proviso created difficulties, inasmuch as under Act, 1981, due date was after the date of filing of returns and thus industries made representations to the Ministry of Finance. Court, looking to the history of amendments held, it is evident that Section 43B, when enacted in 1984, commences with a non obstante clause. The underlying object being to disallow deductions claimed merely by making a book entry based on the mercantile system of accounting. At the same time, Section 43B made it mandatory for the Department to grant deduction in computing income under Section 28 in the year in which tax, duty, cess etc. is actually paid. Parliament took cognizance of the fact that accounting year of a company did not always tally with the due dates under Provident Fund Act, Municipal Corporation Act (Octroi) and other Tax laws. Therefore, by way of First Proviso, an incentive/relaxation was sought to be given in respect of tax, duty, cess or fee by explicitly stating that if such tax duty cess or fee is paid before the date of filing of the return under Act 1961, Assessee would than be entitled to deduction. This relaxation/incentive was restricted only to tax, duty, cess and fee. It did not apply to contributions to labour welfare funds. The reason appears to be that the employer should not sit on the collected contributions and deprive workmen of the rightful benefits under social welfare legislations by delaying payment of contributions to the welfare funds. But when implementation problems were pointed out for different due dates, uniformity was brought about in first proviso

by Finance Act, 2003. Hence, amendment made by Finance Act 2003 in Section 43B is retrospective, being curative in nature and apply from 01.04.1988. In the result when contribution had been paid, prior to filing of return under Section 139(1), Assessee/employer would be entitled for deduction and since deletion of Second Proviso and amendment of First Proviso is curative and apply retrospectively w.e.f. 01.04.1988.

28. From the aforesaid judgment, we find that irrespective of the fact that deduction in respect of sum payable by employer contribution was involved, but Court did not restrict observations, findings and declaration of law to that context but looking to the objective and purpose of insertion of Section 43B applied it to both the contributions. It also observed clearly that Section 43B is with a non-obstante clause and therefore over ride even if, anything otherwise is contained in Section 36 or any provision of Act 1961.

29. Therefore, we are clearly of the view that law laid down by High Courts of Karnataka, Rajasthan, Punjab & Haryana, Delhi, Bombay and Himachal Pradesh have rightly applied Section 43B in respect to both contributions i.e. employer and employee. Otherwise view taken by Gujrat High Court and followed by Kerala High Court, with great respect, we find expedient to dissent therewith.

30. In view of above all the questions formulated above are answered against Revenue and in favour of Assessee."

5.1 In view of the above facts and judicial precedents, I hold that penalty sustained by learned CIT(A) is not justified as the addition itself was not justified.

6. In the result, the appeal of the assessee stands allowed.

(Order pronounced in the open court on 31/07/2019)

Sd/.
(T. S. KAPOOR)
Accountant Member

Dated:31/07/2019
*Singh

Copy of the order forwarded to :

1. The Appellant
2. The Respondent.
3. Concerned CIT
4. The CIT(A)
5. D.R., I.T.A.T., Lucknow