

**IN THE INCOME TAX APPELLATE TRIBUNAL  
“A” BENCH, AHMEDABAD**

**BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER &  
Ms. MADHUMITA ROY, JUDICIAL MEMBER**

I.T.A. No.2037/Ahd/2011  
(Assessment Year : 2007-08)

Agrawal JMC Joint Venture,  
A-104, Sapath IV,  
Opp. Karnavati Club,  
S. G. Road,  
Ahmedabad.

Vs. The Add. CIT,  
Range – 9,  
Ahmedabad.

[PAN No. AAAAA 7053 J]

(Appellant)

..

(Respondent)

**Appellant by :**

Shri Parin Shah, A.R.

**Respondent by:**

Shri S. K. Dev, Sr. D.R.

**Date of Hearing**

22.07.2019

**Date of Pronouncement**

06.08.2019

**ORDER**

**PER Ms. MADHUMITA ROY -JM:**

The instant appeal filed by the assessee is directed against the order dated 14.06.2011 passed by the Commissioner of Income Tax (Appeals)-XV, Ahmedabad under section 143(3) of the Income Tax Act, 1961 (hereinafter referred as to “the Act”) arising out of the order dated 14.12.2009 passed by the ACIT, Range-9, Ahmedabad for the Assessment Year 2007-08 with the following grounds:

- “(1) *The Learned Commissioner of Income- Tax (Appeals) has grievously erred in Law and Facts in confirming the disallowance of Rs. 30574/-being late payment of employee's contribution to provident fund, although the entire amount is paid before the due date of filing of return of income under section 139 (1) of the Act, and hence be allowed in toto, as prayed for.*
- (2) *The learned CIT (Appeals) has grievously erred in not following / ignoring the Binding decisions of the various Income Tax appeals Tribunal High court cited in support of the assessee's case.*

- (3) *The Learned CIT (Appeals) has grievously erred in Law and facts in confirming the disallowance of Rs.1,02,134/- being Provision for leave encashment.*
- (4) *The Learned CIT (Appeals) has grievously erred in not following / ignoring the binding decisions of the Calcutta High Court in the case of Exide Industries Ltd. cited in support of assessee's case.*
- (5) *The appellant craves leave to add, alter, amend any grounds of appeal at or before the date of hearing, for which permission may kindly be granted, and oblige.”*

2. The assessee has challenged the order passed by the Learned Commissioner of Income Tax (Appeals) in confirming the disallowance of Rs.30,574/- being late payment of employee's contribution to provident fund, which was paid before the due date of filing of return of income under section 139(1) of the Act.

3. It is the case of the assessee that the said amount was paid before the due date of filing of return of income u/s 139(1) of the Act and hence disallowance cannot be made. On the other hand, we find that it is a settled principle of law that when the employee's contribution towards PF and ESIC is not made within the due date or even within the grace period, the same is not allowable. The ratio has already been decided by the Jurisdictional High Court in the matter of CIT-vs-Gujarat State Road Transport Corporation reported in [2014] 41 taxmann.com 100 (Gujarat). However, the Learned Counsel appearing for the assessee relied upon the two judgments passed by the Co-ordinate Bench in ITA No.3297 & 3420/Ahd/2014 in the matter of Sun Pharmaceutical Industries Ltd. SPARC-vs-ACIT as well as in ITA No.1733/Ahd/2017 in the matter of Unique Mercantile India Pvt. Ltd.-vs-DCIT, Circle – 4(1)(2), Ahmedabad and prays before us that the matter be set aside to the file of the Learned AO since the appeal relating to this particular issue is pending before the Hon'ble Supreme Court. We have perused these two judgments. However, we are not satisfied with the submissions rendered by the Learned Counsel appearing for the assessee and in view of the ratio laid down by the Learned Jurisdictional High Court in the matter of Gujarat State Road

Transport Corporation, we find no merit in the appeal preferred by the assessee and the prayer to set aside the issue to the file of the Revenue. Hence this ground of appeal is dismissed.

4. The next ground of appeal relates to confirming of disallowance of Rs.1,02,134/- being Provision for leave encashment.

5. During the course of proceeding, upon verification of the record particularly from the Audit Report in Form No.3CD, it was found that the assessee has claimed an amount of Rs.1,02,134/- being Provision for leave encashment but the same remained unpaid during the financial year. A show-cause, therefore, dated 24.11.2009 was issued to the assessee as to why the same should not be disallowed in response whereof the assessee replied that the said provision was claimed as expenses in the books of accounts. The same was also made on the basis of actuarial valuation. It is the case of the assessee that these expenses are allowable in view of the judgment passed by the Hon'ble Calcutta High Court in the matter of Exide Industries Ltd.-vs-Union of India reported in 292 ITR P 470. Further that, the Apex Court has stayed such decision but the merit of the matter has not yet been decided. However, the Hon'ble Apex Court has pleased to permit the assessee to claim such deduction in the return of income and in that view of the matter no disallowance shall be made while computing taxable income. However, such plea of the assessee was not found acceptable by the Learned AO and applying the provision of Section 43B(f), the said claim was disallowed, which was, in turn, confirmed by the Learned CIT(A).

In a similar set of facts the Learned Tribunal in ITA No.1115/Ahd/2013 for A.Y. 2008-09 directed the Learned AO to decide the issue afresh since a substantial question of law has been admitted on the very issue by the Jurisdictional High Court in the matter of Saffire Garments in Tax Appeal No.356 of 2013. The Learned Counsel appearing for

the assessee relied on this particular order passed by the Co-ordinate Bench a copy whereof has also been submitted before us. In that view of the matter, he prayed to for setting aside the issue to the file of the Learned AO to decide the same afresh.

6. We have heard the respective parties, perused the relevant materials available on record and also carefully considered the judgment relied upon by the Learned AR. The relevant portion whereof is as follows:

5. *Before us, the ld. counsel for the assessee placed the approval of the development commissioner which is exhibited at pages 42 & 43 of the paper book. Insofar as not filing the return on or before the due date, the Id. counsel fairly conceded that the return was not filed on time but at the same time, the Id. counsel placed the order of the Hon'ble Jurisdictional High Court of Gujarat in the case of Saffire Garments in Tax Appeal No. 356 of 2013 and stated that the Hon'ble High Court has admitted a substantial question of law and, therefore, the A.O. may be directed to decide the issue afresh after the decision of the Hon'ble High Court.*

6. *We have carefully gone through the orders of the authorities below. The undisputed facts are that the claim of deduction has been denied on two grounds, (i) No approval from the development commissioner was furnished and (ii) the return was not filed within the time limit set by Section 139(1) of the Act. The first ground has been now taken care of by furnishing the copy of the approval from the development commissioner as mentioned elsewhere. Insofar as the second ground is concerned, we find that the Hon'ble Jurisdictional High Court of Gujarat in the case of Saffire Garments in Tax Appeal No. 356 of 2013 is seized with the following substantial question of law:-*

*"Whether in the facts and circumstances of the case the Income Tax Appellate Tribunal was right in law in holding that the proviso to section 10A(1A) of the Income Tax Act is mandatory and whether the assessee can be denied deduction under section 10A, if the return of income is not filed within the time limit set by section 139(1) of the Income Tax Act?"*

7. *Since a substantial question of law has been admitted on this very issue, the A.O. is directed to decide the issue afresh after the decision of the Hon'ble Jurisdictional High Court (supra). We decide accordingly.*

8. *In the result, the appeal filed by the Assessee is partly allowed for statistical purpose."*

We find that the issue is required to be decided afresh by the Learned AO in view of the observation made by the Co-ordinate Bench in the judgment relied upon. Hence, we set aside the issue to the file of the Learned AO to decide the same afresh upon giving an opportunity of hearing to the assessee and also upon taking into consideration the evidences available on record and the evidence which the assessee may choose to file at the time of hearing of the assessment proceeding.

7. In the result, Assessee's appeal is allowed for statistical purposes.

**This Order pronounced in Open Court on**

**06/08/2019**

Sd/-  
(WASEEM AHMED)  
**ACCOUNTANT MEMBER**

Sd/-  
( Ms. MADHUMITA ROY)  
**JUDICIAL MEMBER**

Ahmedabad; Dated 06/08/2019

*Priti Yadav, Sr.PS*

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)-XV, Ahmedabad.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाईल / Guard file.

आदेशानुसार/BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt.Registrar)  
आयकर अपीलीय अधिकरण, अहमदाबाद/ ITAT, Ahmedabad