

IN THE INCOME TAX APPELLATE TRIBUNAL
“H” Bench, Mumbai
Before Shri G. Manjunatha, Accountant Member
and Shri Ravish Sood, Judicial Member

ITA No.341/Mum/2019
(Assessment Year: 2014-15)

DCIT,Cir 4(2)(2),
Room No. 640, 6th Floor,
Aayakar Bhavan, M.K.Road,
Mumbai – 400 020

M/s Hindustan Organic Chemicals Ltd.
401-403, 4th Floor, V Times Square,
CBD Belapur, Sector-15,
Navi Mumbai – 400614

PAN – AAACH2663P

(Appellant)

(Respondent)

Appellant by: Shri R. Bhoopati, D.R
Respondent by: Ms. Neha Paranjpe, A.R
Date of Hearing: 02.03.2020
Date of Pronouncement: 04.03.2020

ORDER

PER RAVISH SOOD, JM

The present appeal filed by the revenue is directed against the order passed by the CIT(A)-9, Mumbai, dated 27.11.2018, which in turn arises from the assessment order passed by the A.O under Sec. 143(3) of the Income Tax Act, 1961(for short 'Act'), dated 26.08.2016 for A.Y. 2014-15. The revenue has assailed the impugned order on the following effective ground of appeal before us:

- “1. On the facts and in the circumstances of the case and in law, the Id. CIT(A) erred in deleting the additions made on account of delayed payments of PF & ESIC.”
2. Briefly stated, the assessee company which is engaged in the business of manufacturing and trading of chemicals had e-filed its return of income for A.Y. 2014-15 on 28.11.2014, declaring its total income at Rs.nil (after showing the current year loss at Rs.140,24,92,234/-). The return of income filed by the assessee was processed as such under

Sec.143(1) of the Act. Subsequently, the case of the assessee was selected for scrutiny assessment under Sec. 143(2) of the Act.

3. During the course of the assessment proceedings it was observed by the A.O that the assessee had delayed the deposit of the employees contribution to ESIC and PF amounting to Rs.2,37,46,611/-. Observing, that the assessee who was obligated to deposit the aforesaid amount within the 'due date', had however failed to do so, the A.O disallowed the same under Sec.36(1)(va) r.w.s. 2(24)(x). On the basis of his aforesaid deliberations the A.O assessed the loss of the assessee company at (-) Rs.1,37,87,45,780/-.

4. Aggrieved, the assessee assailed the assessment order before the CIT(A). Observing, that the issue was squarely covered by the decision of the Hon'ble High Court of Bombay in the assessee's own case in CIT-4 Vs. Hindustan Organic Chemicals Ltd. (ITA No.399 of 2012, dated 11.07.2014) for A.Y. 2006-07 and the order of the ITAT Mumbai in ITA No. 220/Mum/2010, dated 13.01.2012 for A.Y. 2007-08, the CIT(A) vacated the disallowance of Rs.2,37,46,511/- that was made by the A.O under Sec. 36(1)(va) r.w.s. 2(24)(x) of the Act.

5. The revenue being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. As observed by us hereinabove, the A.O taking note of the fact that the assessee had delayed the deposit of the employees contribution towards ESIC and PF of Rs.2,37,46,511/-, had disallowed the same as per the 'Explanation' to Sec. 36(1)(va) r.w. Sec. 2(24)(x) of the Act. Admittedly, though the assessee had delayed the deposit of the aforesaid amounts, however, the same was deposited before the 'due date' of filing of its return of income for the year under consideration. We are unable to accept the view taken by the A.O, that the provisions of Sec.43B would not be applicable as regards the employees contribution to PF & ESIC, as the same would continue to be governed by Sec. 36(1)(va) r.w.s. 2(24)(x) of the Act. As observed by us hereinabove, the issue is squarely covered by the judgment of the Hon'ble High Court of Bombay in the assessee's own case in CIT-4 Vs. Hindustan Organic Chemicals Ltd.(ITA No. 399 of 2012, dated 11.02.2014) for A.Y. 2006-07. Observing, that as the assessee had deposited the employees contribution of provident fund within the 'due date' of filing of its return of income, therefore, the same was allowable as a deduction under Sec. 43B of the Act, the Hon'ble High Court had in its aforesaid order observed as under:

"5. We find no merit in the aforesaid contention. Section 43B of the Income Tax Act 1961 was inserted in the Act with effect from 1st April 1984 by which the mercantile system of accounting with regard to tax, duty and contribution to welfare funds stood discontinued and under section 43B of the Act, it became mandatory for the Assessee to account for the aforesaid items not on a mercantile basis but on a cash basis. This situation continued between 1st April 1984 and 1st April 1988 when Parliament again amended section 43B and inserted the first proviso thereto vide 51TXA399/12 which inter alia laid down that in the context of any sum payable by the Assessee by way of tax, duty, cess or fee, if paid by the Assessee even after the closing of the accounting year but before the date of filing of the return of income, the Assessee would be entitled to the deduction under section 43B on actual payment basis and such deduction would be admissible for that accounting year. This proviso however did not apply to contributions made by the Assessee to the Labour Welfare Funds. In view thereof, by the Finance Act 1988, the second proviso came to be inserted which read as under:-

"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 during the previous year on or before the due date as defined in the Explanation below clause (va) of sub-section (1) of section 36."

Thereafter, the said second proviso was further amended vide Finance Act 1989 with effect from 1st April 1989 which read as under:-

"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 on or before the due date as defined in the Explanation below clause (vu) 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."

6. On a plain reading of the above provisos, it became ex-facie clear that the Assessee - employers were entitled to deductions only if the contributions to any fund for the welfare of the employees stood credited on or before the due date given in the relevant Act.

7. However, the second proviso once again created further difficulties for the Assessee - employers. Therefore, Industry once again made representations to the Ministry of Finance who, after taking cognizance of the difficulties, inserted an amendment vide Finance Act, 2003 which came into force with effect from 1st April 2004. In other words, with effect from 1st April 2004, two changes were made in section 43B viz. deletion of the second proviso to section 43B and further amendment in the first proviso which reads as under:-

"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."

Therefore, the amendments introduced by the Finance Act, 2003 put on par the benefit of deductions of tax, duty, cess and fee on the one hand with contributions to various Employee's Welfare Funds on the other.

8. The section referred to above viz. section 43B and the amendments thereto came up for consideration before the Hon'ble Supreme Court in the case of Commissioner of Income Tax v/s Alom Extrusions Ltd., reported in (2009) 319 ITR 306 (SC) when the Supreme Court inter alia held that

the amendments to the said section brought about by the Finance Act, 2003 with effect from 1st April 2004 were retrospective in nature and would vrd 7 ITXA399/12 operate from 1st April 1988. The ITAT, relying upon the aforesaid judgment of the Supreme Court, has dismissed the Revenue's Appeal and confirmed the order passed by the CIT (Appeals). In this view of the matter and in view of the fact that the Supreme Court has expressly held that the amendments to section 43B that were brought about by the Finance Act, 2003 are retrospective in nature, we find that the ITAT was fully justified in deleting the addition of Rs.1,82,77,138/- on account of delayed payment of Provident Fund of employees' contribution. We therefore find that no substantial question of law arises on this count as sought to be contended by Mr. Malhotra on behalf of the Revenue.

9. Even otherwise, we fail to understand how this deduction could have been disallowed to the Assessee. Admittedly, the Assessment Year in/ question is 2006-07. The second proviso to section 43B quoted above was deleted with effect from 1st April 2004 and simultaneously the first proviso was also amended bringing about a uniformity in deductions claimed towards tax, duty, cess and fee on the one hand and contribution to the employees' provident fund, superannuation fund and other welfare funds on the other. These deductions being claimed in the return of income filed for the Assessment Year 2006-07, the amendments to Section 43B which came into force with effect from 1st April 2004 would have clearly applied to the Assessee's case. In this view of the matter also, we find that the ITAT was vrd 8 ITXA399/12 fully justified in deleting the addition of Rs.1,82,77,138/- on account of delayed payment of provident fund of employees contribution."

We find that as the facts and the issue involved in the present appeal are squarely covered by the aforesaid order of the Hon'ble High Court, therefore, respectfully following the same we uphold the order of the CIT(A) which is found to be in conformity with the same .

6. Resultantly, finding no merit in the appeal of the revenue, we dismiss the same.

Order pronounced in the open court on 04.03.2020

Sd/-

(G. Manjunatha)

ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक 04.03.2020

P.S Rohit

Sd/-

(Ravish Sood)

JUDICIAL MEMBER

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई /
DR, ITAT, Mumbai

6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai