

**IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'B' BENCH,
NEW DELHI**

**BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND
SHRI ANUBHAV SHARMA, JUDICIAL MEMBER**

ITA No. 6475/DEL/2018 [A.Y. 2014-15]

The A.C.I.T
Circle -8(1)
New Delhi

Vs.

M/s Earthline Apparels Pvt Ltd
2168, Gurudwara Road
Karol Bagh, New Delhi

PAN: AABCE 4236 G

(Applicant)

(Respondent)

Assessee By : Shri R.K. Kapoor, CA

Department By : Shri Vivek Kumar Upadhyay, Sr. DR

Date of Hearing : 10.07.2023

Date of Pronouncement : 12.07.2023

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER:-

This appeal by the Revenue is preferred against the order of the
ld. CIT(A) - 3, Delhi dated 19.07.2018 pertaining to Assessment Year
2014-15.

2. The grievances of the Revenue read as under:

"1. The Id. CIT (A) has erred in law and on facts of the case in deleting the addition of Rs. 1,58,77,930/- made by the AO on account of disallowance of part interest expenses

2. Ld. CIT (A) erred in law and on facts of the case in deleting the addition of Rs. 3,29,31,893/- made by the AO on account of disallowance of expenses.

3. Ld. CIT (A) erred in law and on facts of the case in deleting the addition of Rs.70,559/- made by the AO on account of delayed payment of employees contribution towards ESI & PF.

3. At the very outset, the Id. counsel for the assessee drew our attention to the decision of this Tribunal in assessee's own case in ITA No. 1456/DEL/2017 order dated 20.12.2019 and pointed out that the issues raised by the Revenue in the present appeal were there in A.Y 2012-13 also. This Tribunal has decided the issues in favour of the assessee and against the Revenue.

4. The Id. DR could not bring any distinguishing decision in favor of the Revenue.

5. Ground No. 1 relates to the deletion of addition of Rs. 1,58,77,930/- made by the Assessing Officer on account of disallowance of part interest.

6. An identical issue was considered by this Tribunal in A.Y 2012-13 [supra]. At paras 4 of its order and at para 6, the Tribunal held as under:

"6. We find the complete details of the loan taken from the bank were called for and examined during the appellate proceedings by the Id. CIT (A). The interest has been worked out on the reduced amount of the balance outstanding with M/s Aero Club. We find that the repayment of the entire loan including the interest amount outstanding with the assessee has been made by M/s Aero Club. In view of the facts on the record there is no justification for making the disallowance of the interest, hence we decline to interfere with order of the Id. CIT (A)."

7. On finding parity of facts, respectfully following the findings of the co-ordinate bench, this ground is dismissed.

8. Second grievance relates to the deletion of addition of Rs. 3,29,31,893/- made by the Assessing Officer on account of disallowance of expenses.

9. A similar issue was considered by this Tribunal in A.Y 2012-13 [supra]. At para 8 of its order and at para 4, the Tribunal held as under:

"11. Since, the revenue has not brought anything on record to prove the suppression of the sales except financial recalculation of the GP, NP and expenses. The assessee does not incur any advertising, marketing and sales promotion expenses as the entire production of the goods is sold to M/s Aero Club. The assessee debited only the manufacturing expenses in their P&L account. All the advertising, marketing and promotion expenses are incurred by the M/s Aero Club, thus, indicating the business models of both the entities are different. We also gone through the competition of income of the M/s Aero Club and found it to be a tax paying company at maximum marginal rate. Hence, the revenue's allegation that the sale is a diversion of profit of scheme cannot be given any credence. Hence, keeping in view, the entire facts and circumstances of the case, we hereby decline to interfere with the order of the Id. CIT (A)."

10. On finding parity of facts, respectfully following the findings of the co-ordinate bench, this ground is also dismissed.

11. Ground No. 3 relates to the deletion of the addition of Rs. 70,559/- made by the Assessing Officer on account of employees contribution towards ESI and Provident Fund.

12. Though the Id. CIT(A) has allowed the appeal of the assessee following the decision of the Hon'ble Jurisdictional High Court in the case of CIT Vs. AIMIL Limited 321 ITR 508 vide order dated 23.12.2009, but the decision of the Hon'ble High Court has been reversed by the Hon'ble Supreme Court in the case of Checkmate Services Pvt Ltd 143 Taxmann.com 178, wherein the most relevant observations of the Hon'ble Supreme Court read as under:

“32. The scheme of the provisions relating to deductions, such as Sections 32 - 37, on the other hand, deal primarily with business, commercial or professional expenditure, under various heads (including depreciation). Each of these deductions, has its contours, depending upon the expressions used, and the conditions that are to be met. It is therefore necessary to bear in mind that specific enumeration of deductions, dependent upon fulfillment of particular conditions, would qualify as allowable deductions: failure by the assessee to comply with those conditions, would render the claim vulnerable to rejection. In this scheme the deduction made by employers to approved provident fund schemes, is the subject matter of Section 36 (iv). It is noteworthy, that this provision was part of the original IT Act; it has largely remained unaltered. On the other hand, Section 36(1)(va) was specifically inserted by the Finance Act,

1987, w.e.f. 01-04-1988. Through the same amendment, by Section 3(b), Section 2(24) - which defines various kinds of "income" - inserted clause (x). This is a significant amendment, because Parliament intended that amounts not earned by the assessee, but received by it, - whether in the form of deductions, or otherwise, as receipts, were to be treated as income. The inclusion of a class of receipt, i.e., amounts received (or deducted from the employees) were to be part of the employer/assessee's income. Since these amounts were not receipts that belonged to the assessee, but were held by it, as trustees, as it were, Section 36(1)(va) was inserted specifically to ensure that if these receipts were deposited in the EPF/ESI accounts of the employees concerned, they could be treated as deductions. Section 36(1)(va) was hedged with the condition that the amounts/receipts had to be deposited by the employer, with the EPF/ESI, on or before the due date. The last expression "due date" was dealt with in the explanation as the date by which such amounts had to be credited by the employer, in the concerned enactments such as EPF/ESI Acts. Importantly, such a condition (i.e., depositing the amount on or before the due date) has not been enacted in relation to the employer's contribution (i.e., Section 36(1)(iv)).

33. The significance of this is that Parliament treated contributions under Section 36(1)(va) differently from those under Section 36(1)(iv). The latter (hereinafter, "employers' contribution") is described as "sum paid by the assessee as an employer by way of contribution towards a recognized provident fund". However, the phraseology of Section 36(1)(va) differs from Section 36(1)(iv). It enacts that "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 essential character of an employees' contribution, i.e., that it is part of the employees' income, held in trust by the employer is underlined by the condition that it has to be deposited on or before the due date.

34. It is therefore, manifest that the definition of contribution in Section 2 (c) is used in entirely different senses, in the relevant deduction clauses. The differentiation is also evident from the fact that each of these contributions is separately dealt with in different clauses of Section 36 (1). All these establish that Parliament, while introducing Section 36(1)(va) along with Section 2(24)(x), was aware of the distinction between the two types of contributions. There was a statutory classification, under the IT Act, between the two.

35. It is instructive in this context to note that the Finance Act, 1987, introduced to Section 2(24), the definition clause (x), with effect from 1 April 1988; it also brought in Section 36(1)(va). The memorandum explaining these provisions, in the Finance Bill, 1987, presented to the Parliament, is extracted below:

“Measures of penalising employers mis-utilising contributions to the provident fund or any funds set up under the provisions of the Employees State Insurance Act, 1948, or any other fund for the welfare of employees

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12.1. The existing provisions provide for a deduction in respect of any payment by way of contribution to the provident fund or a superannuation fund or any other fund for welfare of employees in the year in which the

liabilities are actually discharged (Section 43B). The effect of the amendment brought about by the Finance act, is that no deduction will be allowed in the assessment of the employer, unless such contribution is paid into the fund on or before the due date. "Due date" means the date by which an employer is required to credit the contribution to the employees account in the relevant fund or under the relevant provisions of any law or term of the contract of service or otherwise.

(Explanation to Section 36 (1) of the Finance Act)

12.2. In addition, contribution of the employees to the various funds which are deducted by the employer from the salaries and wages of the employees will be taxed as income within brackets insertion of new [clause (x) in clause (24) of Section 2] of the employer, if such contribution is not credited by the employer in the account of the employee in the relevant fund by the due date. Where such income is not chargeable to tax under the head "profits and gains of business or profession" it will be assessed under the head "income from other sources."

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44. There is no doubt that in Alom Extrusions, this court did consider the impact of deletion of second proviso to Section 43B, which mandated that unless the amount of employers' contribution was deposited with the authorities, the deduction otherwise permissible in law, would not be available. This court was of the opinion that the omission was curative, and that as

long as the employer deposited the dues, before filing the return of income tax, the deduction was available.

45. A reading of the judgment in Alom Extrusions, would reveal that this court, did not consider Sections 2(24)(x) and 36(1)(va). Furthermore, the separate provisions in Section 36(1) for employers' contribution and employees' contribution, too went unnoticed. The court observed inter alia, that:

"15. ...It is important to note once again that, by Finance Act, 2003, not only the second proviso is deleted but even the first proviso is sought to be amended by bringing about an uniformity in tax, duty, cess and fee on the one hand vis-a-vis contributions to welfare funds of employee(s) on the other. This is one more reason why we hold that the Finance Act, 2003, is retrospective in operation. Moreover, the judgement in Allied Motors (P) Limited (supra) is delivered by a Bench of three learned Judges, which is binding on us. Accordingly, we hold that Finance Act, 2003 will operate retrospectively with effect from 1st April, 1988 [when the first proviso stood inserted]. Lastly, we may point out the hardship and the invidious discrimination which would be caused to the assessee(s) if the contention of the Department is to be accepted that Finance Act, 2003, 2003, to the above extent, operated prospectively. Take an example - in the present case, the respondents have deposited the contributions with the R.P.F.C. after 31st March [end of accounting year] but before filing of the Returns under the Income Tax Act and the date of payment falls after the due date under the Employees' Provident Fund Act, they will be denied deduction for all times. In view of the second proviso, which stood on the statute book at the

relevant time, each of such assessee(s) would not be entitled to deduction under Section 43B of the Act for all times. They would lose the benefit of deduction even in the year of account in which they pay the contributions to the welfare funds, whereas a defaulter, who fails to pay the contribution to the welfare fund right upto 1st April, 2004, and who pays the contribution after 1st April, 2004, would get the benefit of deduction under Section 43B of the Act. In our view, therefore, Finance Act, 2003, to the extent indicated above, should be read as retrospective. It would, therefore, operate from 1st April, 1988, when the first proviso was introduced. It is true that the Parliament has explicitly stated that Finance Act, 2003, will operate with effect from 1st April, 2004. However, the matter before us involves the principle of construction to be placed on the provisions of Finance Act, 2003”.

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48. One of the rules of interpretation of a tax statute is that if a deduction or exemption is available on compliance with certain conditions, the conditions are to be strictly complied with. Eagle Flask Industries Ltd Vs. Commissioner of Central Exercise 2004 Supp (4) SCR 35. This rule is in line with the general principle that taxing statutes are to be construed strictly, and that there is no room for equitable considerations.

49. That deductions are to be granted only when the conditions which govern them are strictly complied with. This has been laid down in State of Jharkhand v Ambay Cements as follows:

“23.... In our view, the provisions of exemption clause should be strictly construed and if the condition under which the exemption was granted stood changed on account of any subsequent event the exemption would not operate.

24. In our view, an exception or an exempting provision in a taxing statute should be construed strictly and it is not open to the court to ignore the conditions prescribed in the industrial policy and the exemption notifications.

25. In our view, the failure to comply with the requirements renders the writ petition filed by the respondent liable to be dismissed. While mandatory rule must be strictly observed, substantial compliance might suffice in the case of a directory rule.

26. Whenever the statute prescribes that a particular act is to be done in a particular manner and also lays down that failure to comply with the said requirement leads to severe consequences, such requirement would be mandatory. It is the cardinal rule of interpretation that where a statute provides that a particular thing should be done, it should be done in the manner prescribed and not in any other way. It is also settled rule of interpretation that where a statute is penal in character, it must be strictly construed and followed. Since the requirement, in the instant case, of obtaining prior permission is mandatory, therefore, non-compliance with the same must result in cancelling the concession made in favour of the grantee, the respondent herein.”

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53. The distinction between an employer's contribution which is its primary liability under law - in terms of Section 36(1)(iv), and its liability to deposit amounts received by it or deducted by it (Section 36(1)(va)) is, thus crucial. The former forms part of the employers' income, and the later retains its character as an income (albeit deemed), by virtue of Section 2(24)(x) - unless the conditions spelt by Explanation to Section 36(1)(va) are satisfied i.e., depositing such amount received or deducted from the employee on or before the due date. In other words, there is a marked distinction between the nature and character of the two amounts - the employer's liability is to be paid out of its income whereas the second is deemed an income, by definition, since it is the deduction from the employees' income and held in trust by the employer.

54. That, however, cannot apply in the case of amounts which are held in trust, as it is in the case of employees' contributions- which are deducted from their income. They are not part of the assessee employer's income, nor are they heads of deduction per se in the form of statutory pay out. They are others' income, monies, only deemed to be income, with the object of ensuring that they are paid within the due date specified in the particular law. They have to be deposited in terms of such welfare enactments. It is upon deposit, in terms of those enactments and on or before the due dates mandated by such concerned law, that the amount which is otherwise retained, and deemed an income, is treated as a deduction. Thus, it is an essential condition for the deduction that such amounts are deposited on or before the due date."

13. Respectfully following the binding decision of the Hon'ble Supreme Court [supra], the findings of the Id. CIT(A) are set aside and disallowance made by the Assessing Officer is confirmed.

14. In the result the appeal of the Revenue in ITA No. 6475/DEL/2018 is partly allowed.

The order is pronounced in the open court on 12.07.2023.

Sd/-

**[ANUBHAV SHARMA]
JUDICIAL MEMBER**

Sd/-

**[N.K. BILLAIYA]
ACCOUNTANT MEMBER**

Dated: 12th JULY, 2023.

VL/

Copy forwarded to:

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2. Respondent
3. CIT
4. CIT(A)
5. DR

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