IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

ITA No. 73 of 2008
Reserved on: 01.11.2012
Decided on: 7.11.2012

Commissioner of Income Tax, Shimla …Appellant.

Versus

M/s Nipso Polyfabriks Ltd., Mehatpur, through its Managing Director.

…Respondent.

Appeal under Section 260-A of the Income Tax Act, 1961.

Coram

The Hon'ble Mr. Justice Deepak Gupta, J.

The Hon'ble Mr. Justice Rajiv Sharma, J.

Whether approved for reporting?[1] *Yes.*

For the appellant: Mr. Vinay Kuthiala, Senior Advocate, with Ms. Vandana Kuthiala, Advocate.

For the respondent: Ms. Radhika Suri, Advocate.

Deepak Gupta, J.

Though the appeal was admitted on three questions of law, learned counsel for the parties agree that questions No. 2 and 3 already stand answered against the revenue by the judgment delivered by this Court in **ITA No. 36 of 2007**, titled **H.P. Tourism Development Corporation Ltd. versus Commissioner of Income Tax, (2010) 328 ITR 508,** and, therefore, the only question of law which survives for decision is as follows:

> **"1. Whether the Tribunal was correct in holding that amounts received by the assessee from employees for crediting to their accounts in provident fund and ESI, but not so credited on or before the due dates specified under the respective statutes, were allowable deductions under section 36 (1) (va) of the Income Tax Act?"**

---

[1] *Whether the reporters of local papers may be allowed to see the Judgment? Yes.*

2. To appreciate the rival contentions of the parties, it would be pertinent to mention that for the assessment year 2001-02, the respondent-assessee declared an income of ₹ 3,16,591/-. During proceedings under Section 143 (1) of the Income Tax Act (hereinafter referred to as the Act), it was noticed that an amount of ₹ 6,23,028/-, which had been collected by the assessee from its employees as their contribution towards their contribution, had not been deposited in the ESI and Provident Fund accounts by the due dates prescribed under the Employees State Insurance and Provident Fund Acts. A sum of ₹ 8,15,196/- being the employer's contribution towards Provident Fund was also not deposited by the due date under the Provident Fund Act. The Assessing Officer disallowed the said payments in reassessment proceedings holding that the assessee was not entitled to deduction of the said amounts in view of Section 36 (1) (va) of the Act read with Section 43 (B) of the Act, since the amounts had not been deposited by the dates prescribed under the Employees State Insurance and Provident Fund Acts. Aggrieved by the said order, the assessee filed appeal, which was allowed by the Commissioner of Income Tax. The Department approached the Tribunal, which dismissed the appeal of the revenue.

3. As far as the contribution of the assessee-employer is concerned, in view of the judgment rendered by us in ITA No. 36 of 2007, titled M/s. H.P. Tourism Development Corporation Ltd. versus Commissioner of Income Tax, following the judgment of the Apex Court in **Commissioner of Income Tax versus Alom Extrusions Ltd., (2009) 319 ITR 306,** it was fairly conceded by Ms. Vandana Kuthiala, learned counsel appearing for the revenue, that that portion of the

dispute is no longer res integra and has to be decided against the revenue.

4. Ms. Vandana Kuthiala has, however, argued that there is a difference between the contribution made by the employer and the contribution which the employer collects from the employees. She submits that in view of the decisions referred to above, the employer can get deduction of the contribution made by him even if it is not deposited within the time granted under the Employees Welfare Funds Acts, in case the said amounts are deposited by the assessee employer before or at the time of filing of the returns. She, however, submits that as far as the employees contribution is concerned, the employer has no business to sit over the same and in case, the employer does not deposit the amount within the time specified under the Welfare Funds Acts, such as ESI Act or Provident Fund Act, then the assessee cannot get benefit of deduction even if the amount is deposited before filing of the return.

5. To appreciate the rival contentions of the parties, it would be pertinent to refer to the definition of Income as provided under Section 2 (24) (x):

> 2. (24) "income" includes -
> .....
> (x) any sum received by the assessee from his employees as contributions to any provident fund or superannuation fund or any fund set up under the provisions of the Employees' State Insurance Act, 1948 (34 of 1948), or any other fund for the welfare of such employees."

6. Reference may also be made to Section 36 (1) (va) of the Act:

> "36. (1) The deductions provided for in the following clauses shall be allowed in respect of the matters dealt with therein, in computing the income referred to in section 28 -

> .....
> (va) 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.
>
> *Explanation.* - For the purposes of this clause, "due date" means the date by which the assessee is required as an employer to credit an employee's contribution to the employee's account in the relevant fund under any Act, rule, order or notification issued thereunder or under any standing order, award, contract of service or otherwise."

7. Further, it would also be pertinent to refer to Section 43B (b) of the Act:

> "43B. Notwithstanding anything contained in any other provision of this Act, a deduction otherwise allowable under this Act in respect of -
> .....
>
> (b) 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 employees,
> .....
>
> shall be allowed (irrespective of the previous year in which the liability to pay such sum was incurred by the assessee according to the method of accounting regularly employed by him) only in computing the income referred to in section 28 of that previous year in which such sum is actually paid by him."

8. Prior to the year 2004, the provisos to Section 43B of the Act read as follows:

> **"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.
>
> **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 (va) 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."

9. Admittedly, the present case relates to the period prior to 2004. The argument raised on behalf of the revenue is that Section 43B of the Act cannot be read into Section 36 (1) (va) and it is urged that if the provisions of Section 43B, especially the provisos thereto, are read into Section 36 (1) (va), then the Explanation below Section 36 (1) (va) is rendered otiose and redundant and such meaning cannot be assigned to the Act.

10. We are not at all impressed by the arguments addressed on behalf of the revenue. The scheme of the Act clearly contemplates that while computing the income under the Head "income from profits and gains of business or profession" under Section 28 of the Income Tax Act, the assessee is entitled to avail all the deductions available to him under Section 30 to Section 43D as laid down under Section 29 of the Income Tax Act.

11. Here it would also be necessary to give some history of these provisions. Prior to the promulgation of the Finance Act, 1987, an employer was entitled to deduction under Section 36 (1) (iv & v) of the amounts contributed by the employer towards provident fund, ESI and other superannuation schemes. By the Finance Act of 1987 Section 2 (24) (x) was inserted and the sums collected by the assessee from his employees as contributions to provident funds or ESI were to be treated as income. By the same Act, Section 36 (1) (va) was introduced. Resultantly, the contribution of the employees collected by the employer was treated as his income. At the same time, the same was allowed as deductible expense if deposited within a particular time.

12. Section 43B of the Act was also amended in the year 1987 itself and the following two provisos were inserted:

> **"**Provided that nothing contained in this section shall apply in relation to any sum referred to in clause (a) 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.
>
> 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."

13. It is, thus, clear that as per the amendment, there was no differentiation between employers or employees contributions. Both had to be deposited by the due date as defined in the Explanation below clause (va) of sub-section (1) of Section 36 of the Act. The second proviso was deleted vide Finance Act of 2003 w.e.f. 1.4.2004.

14. It is contended by Ms. Radhika Suri, learned counsel for the respondent, relying upon the judgment of the Apex Court in **Commissioner of Income Tax versus Alom Extrusions Ltd., (2009) 319 ITR 306,** that this matter is squarely covered by the judgment of the Apex Court. On the other hand, Ms. Vandana Kuthiala submits that the judgment of the Apex Court in **Alom Extrusions case** (supra) only relates to the employers contribution covered under Section 43B of the Act and not to the employees contribution covered under Section 36 (1) (va) of the Act.

15. We may refer to the following observations of the Apex Court:

> *"Income" has been defined under section 2 (24) of the Act to include profits and gains. Under section 2 (24)*

> *(x), any sum received by the assessee from his employees as contributions to any provident fund/superannuation fund or any fund set up under the Employees' State Insurance Act, 1948, or any other fund for welfare of such employees constituted income. This is the reason why every assessee(s) (employer(s)) was entitled to deduction even prior to April 1, 1984, on the mercantile system of accounting as a business expenditure by making provision in his books of account in that regard. In other words, if an assessee(s)-employer(s) is maintaining his books on the accrual system of accounting, even after collecting the contribution from his employee(s) and even without remitting the amount to the Regional Provident Fund Commissioner (RPFC), the assessee(s) would be entitled to deduction as business expense by merely making a provision to that effect in his books of account. The same situation arose prior to April 1, 1984, in the context of assessees collecting sales tax and other indirect taxes from their respective customers and claiming deduction only by making provision in their books without actually remitting the amount to the exchequer. To curb this practice, section 43B was inserted with effect from April 1, 1984, by which the mercantile system of accounting with regard to tax, duty and contribution to welfare funds stood discontinued and, under section 43B, it became mandatory for the assessee(s) to account for the aforestated items not on mercantile basis but on cash basis. This situation continued between April 1, 1984 and April 1, 1988, when Parliament amended section 43B and inserted the first proviso to section 43B. By this first proviso, it was, inter alia, laid down, in the context of any sum payable by the assessee(s) by way of tax, duty, cess or fee, that if an assessee(s) pays such tax, duty, cess or fee even after the closing of the accounting year but before the date of filing of the return of income under section 139(1) of the Act, the assessee(s) would be entitled to deduction under section 43B on actual payment basis and such deduction would be admissible for the accounting year. This proviso, however, did not apply to the contribution made by the assessee(s) to the labour welfare funds."*

16. Thereafter, the Apex Court made reference to second proviso inserted w.e.f. April 1, 1988 vide Finance Act of 1987 and also to the Explanation below Section 36 (1) (va) of the Act and held as follows:

> *"We find no merit in these civil appeals filed by the Department for the following reasons: firstly, as stated above, section 43B (main section), which stood*

> *inserted by the Finance Act, 1983, with effect from April 1, 1984, expressly 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 (main section) made it mandatory for the Department to grant deduction in computing the income under section 28 in the year in which tax, duty, cess, etc., is actually paid. However, Parliament took cognisance of the fact that the accounting year of a company did not always tally with the due dates under th Provident Fund Act, Municipal Corporation Act (octroi) and other tax laws. Therefore, by way of the first proviso, an incentive/relaxation was sought to be given in respect of tax, duty, cess or fee by filing of the return under the Income-tax Act (due date), the assessee(s) then would be entitled to deduction. However, 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(s) should not sit on the collected contributions and deprive the workmen of the rightful benefits under social welfare legislations by delaying payment of contributions to the welfare funds."*

The Apex Court finally held as follows:

> *"For the aforestated reasons, we hold that the Finance Act, 2003, to the extent indicated above, is curative in nature, hence, it is retrospective and it would operate with effect from April 1, 1988 (when the first proviso came to be inserted)."*

17. We may also make reference to the decision of a Division Bench of the Delhi High Court in **Commissioner of Income-Tax versus Aimil Ltd., (2010) 321 ITR 508.** The question before the Delhi High Court was specifically in relation to the employees contribution as is the case before us. The Delhi High Court culled out the argument of the revenue in the following terms:

> *"What is sought to be argued is that distinction is to be made while treating the case related to the employers' contribution on the one hand and the employees' contribution on the other hand. It was submitted that when the employees' contribution is recovered from their salaries/wages, that is trust money in the hands of the assessee. For this reason, rigours of law are provided by treating it as income when the assessee receives the employees' contribution and enabling the assessee to claim deduction only on actual payment by due date specified under the provisions."*

18. After referring to the judgment of the Apex Court in **Commissioner of Income Tax versus Vinay Cement, (2009) 313 ITR 1,** the Delhi High Court held as follows:

> *"We may only add that if the employees' contribution is not deposited by the due date prescribed under the relevant Acts and is deposited late, the employer not only pays interest on delayed payment but can incur penalties also, for which specific provisions are made in the Provident Fund Act as well as the ESI Act. Therefore, the Act permits the employer to make the deposit with some delays, subject to the aforesaid consequences. In so far as the Income-tax Act is concerned, the assessee can get the benefit if the actual payment is made before the return is filed, as per the principle laid down by the Supreme Court in Vinay Cement (2009) 313 ITR (St.) 1."*

19. We are in respectful agreement with the reasoning given by the Delhi High Court. A number of other judgments have been cited before us, but we need not cite the same. We are of the considered view that the judgment of the Kerala High Court in **Commissioner of Income Tax versus Commonwealth Trust Ltd., (2004) 269 ITR 290,** is no longer good law in view of the judgment of the Apex Court in **Alom Extrusions case.**

20. The Apex Court while deciding the **Alom Extrusions case** specifically considered the provisions of Section 36 (1) (va) of the Act, but made no distinction between the contribution of the employer or the employee. As held by the Apex Court in **Alom Extrusions case,** the purpose of introducing the provisos, the Explanation and amending the Act from time to time was to prevent unscrupulous assessees from taking benefit of law and claiming deductions even when they had not deposited the amount.

21. By the Finance Act of 2003, which came into effect from April 1, 2004, the second proviso to Section 43B, which specifically made reference to Section 36 (1) (va) was deleted. The Apex Court in

Alom Extrusions case clearly held that the amendment was curative in nature and hence would apply with retrospective effect from April 1, 1988. The second proviso to Section 43B (b) specifically referred to the due date under Section 36 (1) (va) of the Act and as such, it cannot be urged that the provisions of Section 43B and Section 36 (1) (va) should not be read together. It is clear that the law was enacted to ensure that the payment of the contributions towards the provident funds, the ESI funds or other such welfare schemes must be made before furnishing the return of income under sub-section (1) of Section 139 of the Act. When we read Section 36 (1) (va) and Section 43B together, it is obvious that earlier Section 43B made reference to the due date as prescribed under Section 36 (1) (va). There was a conflict between the first and the second proviso and the second proviso was deleted. The Apex Court held that this amendment being curative in nature was retrospective. According to us, the benefit of this amendment must be extended to the employees' contribution also.

22. We are dealing with cases where though the amount was not deposited by the due date under the Welfare Acts, it was definitely deposited before furnishing the returns. We see no reason to make any distinction between the employees' contribution or the employers' contribution. Once the contribution is there, whether by the employee or by the employer, it is a contribution to a welfare fund held in trust by the employer, who is bound to deposit the same. When the employer does not deposit the same within the time prescribed under the Welfare Acts, such as the Provident Fund Act, ESI Act etc., he may face criminal prosecution under the said Act. He may also become liable to pay interest or penalty. However, that is no reason to deny him the benefit

of Section 43B, which starts with a non obstante clause and which clearly lays down that the assessee can take benefit of deduction of such contributions, if the same are paid before furnishing of the return.

23. In view of the above discussion, we find no merit in the appeal filed by the revenue, which is accordingly dismissed.

(Deepak Gupta)
Judge

(Rajiv Sharma)
Judge

7th November, 2012
(rajni)