IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL NO. 637 of 2013
With
TAX APPEAL NO. 1711 of 2009
With
TAX APPEAL NO. 2577 of 2009
With
TAX APPEAL NO. 925 of 2010
With
TAX APPEAL NO. 949 of 2010
With
TAX APPEAL NO. 965 of 2010
With
TAX APPEAL NO. 1655 of 2010
With
TAX APPEAL NO. 2365 of 2010
With
TAX APPEAL NO. 2378 of 2010
With
TAX APPEAL NO. 2644 of 2010
With
TAX APPEAL NO. 814 of 2011

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE M.R. SHAH **Sd/-**
and
HONOURABLE MR.JUSTICE R.P.DHOLARIA **Sd/-**

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	**YES**
2	To be referred to the Reporter or not ?	**YES**
3	Whether their Lordships wish to see the fair copy of the judgment ?	**NO**
4	Whether this case involves a substantial question of	**NO**

law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ? **NO**

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COMMISSIONER OF INCOME TAX II....Appellant(s)

Versus

GUJARAT STATE ROAD TRANSPORT CORPORATION....Opponent(s)

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Appearance:

TAX APPEAL NO. 637 of 2013

MR MANISH R. BHATT, SR. ADVOCATE with MRS MAUNA M BHATT, ADVOCATE for the Appellant

MR DEEPAK SHAH, ADVOCATE for the Respondent

TAX APPEAL NO. 1711 of 2009

NR KM PARIKH, ADVOCATE for the Appellant

SERVED BY AFFIXING

TAX APPEAL NO. 2577 of 2009

MS PAURAMI B. SHETH, ADVOCATE for the Appellant

MR MANISH J SHAH, ADVOCATE for the Respondent

TAX APPEAL NO. 925 of 2010

MR MANISH R. BHATT, SR. ADVOCATE with MRS MAUNA M BHATT, ADVOCATE for the Appellant

MR MANISH J SHAH, ADVOCATE for the Respondent

TAX APPEAL NO. 949 of 2010

MR MANISH R. BHATT, SR. ADVOCATE with MRS MAUNA M BHATT, ADVOCATE for the Appellant

RULE SERVED

TAX APPEAL NO. 965 of 2010

MR MANISH R. BHATT, SR. ADVOCATE with MRS MAUNA M BHATT, ADVOCATE for the Appellant

RULE SERVED

TAX APPEAL NO. 1655 of 2010

MR SUDHIR M. MEHTA, ADVOCATE for the Appellant
MR MANISH J. SHAH, ADVOCATE for the Respondent

TAX APPEAL NO. 2365 of 2010

MS PAURAMI B. SHETH, ADVOCATE for the Appellant
MR MANISH J SHAH, ADVOCATE for the Respondent

TAX APPEAL NO. 2378 of 2010

MS PAURAMI B. SHETH, ADVOCATE for the Appellant
RULE SERVED

TAX APPEAL NO. 2644 of 2010

MS PAURAMI B. SHETH, ADVOCATE for the Appellant
RULE UNSERVED

TAX APPEAL NO. 814 of 2011

MR MANISH R. BHATT, SR. ADVOCATE with MRS MAUNA M BHATT, ADVOCATE for the Appellant
RULE UNSERVED

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CORAM: **HONOURABLE MR.JUSTICE M.R. SHAH**
and
HONOURABLE MR.JUSTICE R.P.DHOLARIA

Date : 26/12/2013

CAV JUDGEMNT

(PER : HONOURABLE MR.JUSTICE M.R. SHAH)

1.00. As common question of facts and law arise in this group of appeals, they are disposed of by this common judgement.

2.00. Common substantial question of law which arises in

this group of appeals is with respect to deletion of disallowance of employees' contribution to PF Account as well as ESI contribution despite provisions of section 36(1)(va) of the Income Tax Act, 1961. (hereinafter referred to as "the IT Act" for short).

3.00. For the sake of convenience facts of Tax Appeal No.637 of 2013 are narrated which in nutshell are as under :

3.01. That the respondent – assessee is a Corporation run by State of Gujarat, engaged in the business of public transportation. The assessee filed their return of income declaring total loss of Rs.35,51,88,507/- on 30/10/2005 for the AY 2005-06. That the return was processed under section 143(1) of the IT Act. That the assessee filed revised return of income on 31/12/2006 declaring total loss of Rs.93,16,88,230/- on the basis of the final audited accounts and auditor report under section 44AB of the IT Act (Revised) after considering the observations / comments of the Statutory Auditor i.e. Accountant Journal.

3.02. That the case was selected for scrutiny and notice under section 143(2) of the IT Act dtd. 21/6/2006 was issued and served upon the assessee on 22/6/2006. That thereafter notice under section 142(1) of the IT Act dtd. 22/5/2007 was issued and served upon the assessee on 23/6/2007. It appears that there was no compliance from the assessee to the said notice and therefore, further notices under section 143(2) of the IT Act and under section 142(1) of the IT Act requiring the assessee to furnish the details were issued on 19/10/2007 and served upon the assessee on 22/10/2007. In response to the

same, the Account Officer of the assessee along with its Chartered Accountant attended and submitted submissions vide letters dated 4/6/2007 and 2/11/2007. The Account Officer submitted chart showing provident fund contribution collected from the employees and deposited with PF Trust as well as Corporation's contribution towards contributory provident fund and its deposit with the PF Trust. That on verification of the same, it was found that there was shortfall in remittance of provident fund collected from the employees which was required to be treated as income of the assessee as per the provisions contained in section 2(24)(x) read with section 36(1)(va) of the IT Act. There was also shortfall in the fund of remittance of assessee Corporation, which according to the Assessing Officer was required to be disallowed under section 43B of the IT Act.

3.03. It was found that the assessee Corporation collected amount of Rs.51,06,02,712/- from its employees but it has deposited an amount of Rs.21,16,61,582/- with provident fund trust. Thus, there was shortfall of Rs.24,89,41,130/-. The Assessing Officer treated the aforesaid amount of Rs.24,89,41,130/- as income of the assessee Corporation considering section 2(24)(x) read with section 36(1) (va) of the IT Act while passing final assessment order.

3.04. The Assessing Officer also added amount of Rs.1,93,55,580/- being the amount of shortfall towards the employers' contributory provident fund and therefore disallowed the same under section 43B of the IT Act and disallowed the said amount of Rs.1,93,55,580/- from the expenses claimed by the assessee Corporation for the year

under consideration, as per the provisions contained in section 43B of the IT Act.

3.05. Thereafter, being aggrieved by and dissatisfied with the Assessment Order passed by the Assessing Officer in making addition of Rs. Rs.24,89,41,130/- by invoking provisions of section 2(24)(x) read with section 36(1) (va) of the IT Act being shortfall in employees' contribution to the provident fund and in making total disallowance of Rs.1,93,55,580/- being shortfall in employers' contribution to the provident fund, the assessee preferred an appeal before the CIT(A) and the learned CIT(A) by order dtd. 25/6/2009 partly allowed the said appeal and directed to delete disallowance of Rs.24,89,41,130/- (shortfall in employees' contribution to PF Account) and Rs.1,93,55,580/- (shortfall in employers' contribution to PF Account), by observing that employees' contribution / employer's contribution was deposited before the filing of the return under section 139(1) of the IT Act for the relevant period.

3.06. Being aggrieved by and dissatisfied with the order passed by the CIT(A) in deleting disallowance of Rs.24,89,41,130/- being shortfall in employees' contribution to PF Account and Rs.1,93,55,580/- being shortfall in employers' contribution to PF Account, the revenue preferred appeal before the ITAT being ITA No.2785/Ahd/2009. That the learned ITAT by the impugned Judgement and Order, relying upon the decision of the Hon'ble Supreme Court in the case of **Commissioner of Income-Tax Vs. Alom Extrusions Ltd.**, reported in **[2009] 319 ITR 306 (SC)**, has dismissed the said appeal confirming the order passed by the CIT(A) deleting

disallowance of short fall in employees' contribution and employers' contribution to PF Account.

3.07. Being aggrieved by and dissatisfied with the Judgement and Order passed by the ITAT in deleting disallowance of Rs.24,89,41,130/- being shortfall in employees' contribution to PF Account, the appellant revenue has preferred Tax Appeal No.637 of 2013.

3.08. In Tax Appeal Nos.637/2013; 1711/2009; 925/2010; 949/2010; 2365/2010; 2644/2010 and 814/2011, the issue is with respect to disallowance of shortfall of employees' contribution to PF Account under section 36(1) (va) of the IT Act and in Tax Appeal Nos.2577/2009; 965/2010 and 1655/2010, the issue is with respect to shortfall in employees' contribution as well as ESI contribution and in Tax Appeal No.2378/2010, the issue is with respect to shortfall in ESI contribution only.

4.00. Mr.Manish Bhatt, learned counsel has appeared on behalf of the revenue with Mr.K.M. Parikh and Ms.Paurami Sheth, and Mr.Sudhir Mehta and Mr.S.N. Soparkar, learned counsel has appeared on behalf of the assessee. Mr.Manish J. Shah and Mr.Dipak Shah, learned advocates have also appeared on behalf of the respective assessees.

4.01. On behalf of the revenue, Mr.Manish Bhatt, learned counsel has made submissions and on behalf of the assessee, Mr.S.N. Soparkar, learned counsel has made submissions and Mr.Manish J. Shah and Mr.Dipak Shah, learned advocates have adopted the submissions made by Mr.S.N. Soparkar,

learned counsel appearing on behalf of the assessee.

4.02. Mr.Manish Bhatt, learned counsel appearing on behalf of the revenue has vehemently submitted that the learned tribunal has materially erred in relying upon the decision of the Hon'ble Supreme Court in the case of **Commissioner of Income-Tax Vs. Alom Extrusions Ltd.**, reported in **[2009] 319 ITR 306 SC**. It is submitted that as such before the Hon'ble Supreme Court in the case of Alom Extrusions (supra) the issue involved was with respect to employer's contribution to PF Account whereas in the present cases, the issue involved is with respect to employees' contribution to PF Account. It is submitted that as such under the Income Tax Act provisions with respect to employees' contribution to PF Account and employers' contribution to PF Account are different. It is submitted that as such with respect to employers contribution, section 43B of the IT Act would be applicable. However, with respect to employees' contribution, section 36(1) (va) of the IT Act would be applicable. It is submitted that both the provisions i.e. section 43B and section 36(1) (va) of the IT Act are different and distinct and will operate in different situation and with respect to different contributions and therefore, the provision applicable with respect to section 43B cannot be made applicable with respect to section 36(1) (va) of the IT Act. It is, therefore, submitted that the learned appellate tribunal has materially erred in relying upon the decision of the Hon'ble Supreme Court in the case of Alom Extrusions Ltd. (supra).

4.03. Mr.Manish Bhatt, learned counsel appearing on behalf of the revenue has further submitted that as per the

definition of "Income" provided under section 2(24)(x), any sum received by the assessee from his employees as contribution to any provident fund or superannuation fund or any fund set up under the provisions of Employees State Insurance Act or any other fund for the welfare of such employees is required to be included in the income of the assessee.

4.04. Mr.Manish Bhatt, learned counsel appearing on behalf of the revenue has further submitted that as per the provisions of section 36(1)(va) with respect to any sum received by the assessee from any of its employees to which provision of sub-clause (x) of clause (24) of section 2 apply, and if the same is credited by the assessee to the employees account in the relevant fund or funds on or before the due date, the assessee shall be entitled to the deduction. It is submitted that even explanation to Section 36(1)(va) makes it very much clear that for the purpose of Clause (va) of sub-section (1) of section 36 "due date" means the date by which the assessee is required as an employer to credit the employees' contribution to the employees account in the relevant fund under any Act, Rule or Notification issued thereunder or under any standing order, award or contract of service or otherwise. It is submitted that therefore, during the relevant assessment year, if the employer has not deposited the entire amount towards employees' contribution with the PF Department on or before the relevant date (Due Date) under the PF Act / ESI Act, to the extent there is a shortfall in deposit of the employees' contribution / ESI contribution, the assessee shall not be entitled to the deduction.

4.05. Mr.Manish Bhatt, learned counsel appearing on behalf of the revenue has further submitted that provisions of section 43B of the IT Act which will be applicable to the employers' contribution to any provident fund or any other fund for the welfare of the employees and the Amendment made in section 43B which provides that any such amount of employers' contribution is deposited by the assessee / employer on or before the due date of filing of the return under section 139 of the IT Act shall be entitled to deduction in the relevant year, shall not be applicable with respect to employees' contribution. It is submitted that, therefore, when the assessee has not deposited the employees' contribution in the PF Account before the due date provided under the PF Act and/or ESI Act, the assessee shall not be entitled to deduction under section 36 of the IT Act in the relevant assessment order though the assessee might have deposited employees contribution on or before the due date of filing of the return under section 139 of the IT Act. It is submitted that, therefore, both, the learned CIT(A) as well as the learned tribunal have materially erred in deleting disallowance of shortfall in employees' contribution, by holding that as the assessee had deposited the shortfall on or before the due date of filing of the return under section 139 of the IT Act, the assessee shall be entitled to the deduction under section 36(1)(va) of the Act.

By making above submissions, it is requested by Mr.Manish Bhatt, learned counsel appearing on behalf of the revenue to admit and allow all these appeals and quash and set aside the respective orders passed by the learned appellate tribunal in deleting disallowance of shortfall in employees PF contribution / ESI contribution.

5.00. On the other-hand, Mr.S.N. Soparkar, learned counsel appearing on behalf of the assessee has supported the respective orders passed by the learned appellate tribunal. The learned counsel appearing on behalf of the assessee has vehemently submitted that as such the controversy raised in the present appeals is squarely covered by the decision of the Hon'ble Supreme Court in the case of Alom Extrusions Ltd. (supra)

5.01. Learned counsel appearing on behalf of the assessee has also relied upon the following decisions in support of their submissions that the learned appellate tribunal has rightly deleted disallowance of shortfall in employees' contribution by observing that as the respective assessee have deposited shortfall in employees' contribution in PF Account on or before the due date of filing of the return as provided under section 139 of the IT Act, considering section 43B of the IT Act, the assessee would be entitled to disallowance :-

[1] Commissioner of Income-Tax Vs. Alom Extrusions Ltd., [2009] 319 ITR 306 SC;

[2] Commissioner of Income-Tax Vs. Aimil Ltd., [2010] 321 ITR 508 (Delhi);

[3] Commissioner of Income-Tax Vs. Nipso Polyfabriks Ltd., [2013] 350 ITR 327 (Himachal Preadesh);

[4] Commissioner of Income-Tax Vs. Alembic Glass Industries Ltd., [2005] 279 ITR 331 (Gujarat);

[5] Commissioner of Income-Tax and another Vs. Sabari

Enterprises, [2008] 298 ITR 141 (Karnataka);

[6] Commissioner of Income Tax Vs. Pamwi Tissues Ltd., reported in [2009] 313 ITR 137 (Bombay).

[7] Spectrum Consultants India (P) Ltd. Vs. Commissioner of Income-Tax, Bangalore-III, [2013] 34 taxmann.com 20 (Karnataka);

[8] Commissioner of Income-Tax, Udaipur Vs. Udaipur Dugdh Utpadak Sahakari Sandh Ltd., [2013] 35 taxmann.com 616 (Rajasthan) and

[9] Commissioner of Income-Tax, Faridabad Vs. Hemla Embroidery Mills (P) Ltd., [2013] 37 taxmann.com 160 (Punjab & Haryana).

5.02. Relying upon the aforesaid decisions, it is vehemently submitted by the learned counsel appearing on behalf of the revenue that in all the aforesaid cases it is held that if the shortfall in the provident fund / ESI fund is deposited / made before filing of the return, assessee shall be entitled to deduction under section 36(1) (va) in the same year. It is submitted by the learned counsel appearing on behalf of the assessee that in all the aforesaid decisions it is held by various High Courts that the deletion with effect from April 1, 2004 by the Finance Act, 2003 of the second proviso to section 43B of the Income Tax Act, which stipulated that contributions to the provident fund and Employees State Insurance fund should be made within the time mentioned in section 36(1)(va), that is the time allowed under the Employees' Provident Fund and Miscellaneous Provisions Act, 1952, as well as the Employees' State Insurance Act, 1948, is treated as retrospective in

nature. It is further held that if the provident fund and ESI contribution is made before due date of filing of the return under section 139 of the I.T. Act, there shall not be disallowance in view of provisions of section 43B as amended by Finance Act, 2003. It is submitted that in all these cases, admittedly provident fund / ESI funds have been deposited by the respective assessee on or before the due date of filing of the return and therefore, they shall be entitled to the deduction in the same year, as rightly allowed by the learned appellate tribunal.

5.03. Relying upon the decision of the Hon'ble Supreme Court in the case of **Commissioner of Income-Tax, Gujarat-I Vs. Sarabhai Sons Ltd**., reported in **[1983] 143 ITR 473 SC**, it is submitted by Mr.Soparkar, learned counsel appearing on behalf of the assessee that as observed and held by the Hon'ble Supreme Court in the said decision, if two views are possible and different High Courts have taken a particular one view, this Court may not take a different view. Therefore, it is requested to follow the aforesaid decisions relied upon by the assessee and hold that the respective assessee shall be entitled to the deduction even with respect to the shortfall in depositing employees' contribution and ESI contribution, as the same have been deposited on or before the due date of the filing of the return, considering Amended section 43B of the IT Act and it is requested to dismiss all these appeals.

6.00. In rejoinder to the above, learned counsel appearing on behalf of the revenue has submitted that in most of the decisions which are relied upon by the assessee, the

controversy was with respect to shortfall in employers' contribution and/or whether Amendment in section 43B of the IT Act made by Finance Act, 2003 would have retrospective effect or not. It is submitted that even in the case before the Hon'ble Supreme Court in **Alom Extrusions Ltd.** the controversy was with respect to shortfall in employers' contribution and retrospective application of Amendment in section 43B of the IT Act made by Finance Act, 2003.

6.01. Now, so far as the reliance placed by the learned counsel appearing on behalf of the assessee on the decision of the Hon'ble Supreme Court in the case of **Sarabhai Sons Ltd**. (supra) and request not to take a contrary view than the view taken by the other High Courts is concerned, it is submitted by Mr.Manish Bhatt, learned counsel appearing on behalf of the revenue that if only one view is possible as canvassed on behalf of the revenue, in such a case it will be open for this Court to take a different view than the view taken by the other High Courts.

By making above submissions it is requested to allow these appeals.

7.00. Heard the learned advocates appearing on behalf of the respective parties at length.

7.01. Short question which is posed for consideration of this Court is with respect to the disallowance of the amount being employees' contribution to PF Account / ESI Contribution which admittedly which the concerned assessee did not

deposit with the PF Department / DSI Department within due date under the PF Act and/or ESI Act.

7.02. To answer the above controversy, the relevant provisions of Income Tax Act, 1961 are required to be referred to.

7.03. "Income" has been defined under section 2(24) of the Act.

Under section 2(24)(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 Employees' State Insurance Act, 1948, or any other fund for welfare of such employees, constitute income. Section 2(24)(x) reads as under :-

> **"Section 2(24)(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 Employees' State Insurance Act, 1948, or any other fund for welfare of such employees."**

7.04. Section 36 of the Act provides for deduction in computing the income referred to in section 28. The relevant provisions applicable to the present cases would be Section 36(1)(va). As per sub-section 36(1)(va), assessee shall be entitled to the deduction in computing the income referred to in section 28 with respect to any sum received by the assessee from 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 employees' accounts in the

relevant fund or funds on or before the "Due Date". As per explanation to section 36(1)(va) for the purpose of the said clause, "Due Date" means the date by which the assessee is required as an employer to credit the employees' contribution to the employees account in the relevant fund under the Act, Rule, Order or Notification issued thereunder or under any Standing Order, Award, Contract or Service or otherwise. Section 36(1)(va) reads as under :

> **"Section 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--**
>
> **Section 36(1) (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 purpose 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 or service or otherwise."**

7.05. Another provision which is required to be considered while considering the above controversy would be Section 43B of the Act, which stood prior to the amendment of section 43B of the Act vide Finance Act, 2003 and after the amendment to Section 43B of the Act by Finance Act, 2003. Section 43B of the Act prior to the amendment of Section 43B of the Act vide Finance Act, 2003 reads as under :

> **"Provided that nothing contained in this section shall apply in relation to any sum referred to in clause (a) or clause (c) or clause (d) or clause (e) or clause (f), 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 th 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."**

By the Finance Act, 2003, Second Proviso to section 43B of the Act came to be deleted and even the first proviso to section 43B of the Act came to be amended. The first proviso to section 43B of the Act, after its amendment by the Finance Act, 2003 reads as under :-

> **"Provided that nothing contained in this section 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."**

7.06. Considering the aforesaid provisions of the Act, as per section 2(24)(x), any sum received by the assessee from his employees as contribution to any provident fund or superannuation fund or any fund set up under the provisions of

ESI Act or any other fund for the welfare of such employees shall be treated as an 'Income'. Section 36 of the Act deals with the deductions in computing the income referred to in section 28 and as per section 36(1)(va) such sum received by the assessee from any of his employees to which provisions of sub-clause (x) of clause (24) of section 2 apply, the assessee shall be entitled to deduction of such amount in computing the income referred to in section 28 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" i.e. date by which the assessee is required as an employer to credit the employee's contribution to the employee's account in the relevant fund, in the present case, the provident fund and ESI Fund under the Provident Fund Act and ESI Act. Section 43B is with respect to certain deductions only on actual payment. It provides that notwithstanding anything contained in any other provisions of the Act, a deduction otherwise liable under the 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 the employees in computing the income referred to in section 28 of that previous year in which such sum is actually paid by him. It appears that prior to the amendment of section 43B of the Act vide Finance Act, 2003, an assessee was entitled to deductions with respect to the sum paid 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 the employees (employer's contribution) provided such sum – employer's contribution is actually paid by the assessee on or before the due date applicable in his case for furnishing 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 and the evidence of such payment is furnished by the assessee along with such return. It also further provided that no deduction shall, in respect of any sum referred to in clause (B) i.e. with respect to the employer's contribution, be allowed unless such sum is actually been paid in cash or by issue of cheque or draft or by any other mode on or before the due date as defined in explanation below clause (va) of sub-section (1) of section 36 and where such sum has been made otherwise that in cash, the sum has been realised within 15 days from the due date. By the Finance Act 2003, Second Proviso of section 43B of the Act has been deleted and First Proviso to section 43B has also been amended which is reproduced hereinabove. Therefore, with respect to employer's contribution as mentioned in clause (b) of section 43(B), if any sum towards employer's contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of the employees is actually paid by the assessee on or before the due date applicable in his case for furnishing the return of the income under sub-section (1) of section 139, assessee would be entitled to deduction under section 43B on actual payment and such deduction would be admissible for the accounting year. However, it is required to be noted that as such there is no corresponding amendment in section 36(1) (va). Deletion of Second Proviso to section 43B vide Finance Act 2003 would be with respect to section 43B and with respect to any sum mentioned in section 43(B) (a to f) and in the present case, employer's contribution as mentioned in section 43B(b). Therefore, deletion of Second Proviso to section 43B and amendment in first proviso to section 43B by Finance Act, 2003 is required to be confined to section 43B

alone and deletion of second proviso to section 43B vide amendment pursuant to the Finance Act, 2003 cannot be made applicable with respect to section 36(1)(va) of the Act. Therefore, any sum with respect to the employees' contribution as mentioned in section 36(1)(va), assessee shall be entitled to the deduction of such sum towards the employee's contribution if the same is deposited in the accounts of the concerned employees and in the concerned fund such as Provident Fund, ESI Contribution Fund, etc. provided the said sum is credited by the assessee to the employees' accounts in the relevant fund or funds on or before the 'due date' under the Provident Fund Act, ESI Act, Rule, Order or Notification issued thereunder or under any Standing Order, Award, Contract or Service or otherwise. It is required to be noted that as such there is no amendment in section 36(1)(va) and even 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 employer's contribution Second Proviso to section 43B which provided that even with respect to employers' contribution [(section 43(B)b], assessee was required to credit 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) is also amended and/or explanation to section 36(1)(va) has been deleted and/or amended.

It is also required to be noted at this stage that as per the definition of "income" as per section 2(24)(x), any sum received by the assessee from his employees as contribution to any Provident Fund or Superannuation Fund or any fund set

up under the provisions of ESI Act or any other fund for the welfare of the such employees is to be treated as income and on fulfilling the condition as mentioned under section 36(1)(va), the assessee shall be entitled to deduction with respect to such employees' contribution. Section 2(24)(x) refers to any sum received by the assessee from his employees as contribution and does not refer to employer's contribution. Under the circumstances and so long as and with respect to any sum received by the assessee from any of his employees to which provisions of sub-clause (x) of sub-section 24 of section 2 applies, assessee shall not be entitled to deduction of such sum in computing the income referred to in section 28 unless and until such sum is credited by the assessee to the employees' account in the relevant fund or funds on or before the due date as mentioned in explanation to section 36(1)(va). 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 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.

7.07. Now so far as the reliance placed upon the decision of the Hon'ble Supreme Court in the case of **Alom Extrusions Ltd.** (supra), by the learned ITAT as well as learned advocates appearing on behalf of the assessee in support of their submission that in view of amendment in section 43B pursuant to Finance Act, 2003, by which the second proviso to section 43B has been deleted and therefore even with respect to employees contribution despite section

36(1)(va), and explanation to section 36(1)(va), if the employees' contribution is credited after the due date mentioned in the particular Act but credited on or before the due date by filing return under section 139 of the Act, assessee shall be entitled to the deduction of such amount, is concerned, on considering the controversy before the Hon'ble Supreme Court in the case of **Alom Extrusions Ltd.** (supra), the said decision would not be applicable to the facts of the present case. In the said case before **Alom Extrusions Ltd.**, the controversy was whether the amendment in section 43B of the Act, vide Finance Act, 2003 would operate retrospectively w.e.f. 1/4/1988 or not. It is also required to be noted that in the case before the Hon'ble Supreme Court, the controversy was with respect to employers' contribution as per section 43(B)(b) of the Act and not with respect to employees' contribution under section 36(1)(va). Before the Hon'ble Supreme Court in the case of **Alom Extrusions Ltd.** (supra) the Hon'ble Supreme Court had no occasion to consider deduction under section 36(1)(va) of the Act and with respect to employees' contribution. As stated above, the only controversy before the Hon'ble Supreme Court was with respect to amendment (deletion) of the Second Proviso to section 43(B) of the Income Tax Act, 1961 by the Finance Act, 1963 operates w.e.f. 1/4/2004 or whether it operates retrospectively w.e.f. 1/4/1988. Under the circumstances, the learned tribunal has committed an error in relying upon the decision of the Hon'ble Supreme Court in the case of **Alom Extrusions Ltd.** (supra) while passing the impugned judgement and order and deleting disallowance of the respective sums being employees' contribution to PF Account / ESI Account, which were made by the AO while considering the proviso to section section 36(1)

(va) of the Income Tax Act.

7.08. Now, so far as the reliance placed upon the decision of the Division Bench of this Court in the case of **Alembic Glass Industries Ltd.** (supra) is concerned, on facts and considering the provisions of section section 36(1)(va) of the Act as is stands, the said decision would not be applicable to the facts of the case on hand and the controversy in question.

7.09. Now, so far as the reliance placed upon the decision of the Karnataka High Court in the case of **Sabari Enterprises** (supra) is concerned, on facts and controversy raised in the present appeals, the said decision would not be any assistance to the assessee. In the case before the Karnataka High Court, the dispute was with respect to the employer's contribution and the controversy was whether the amendment to section 43B of the Act would be retrospective in nature or not. In the aforesaid case before the Karnataka High court, there was no dispute with respect to employees' contribution as is there in the present case.

7.10. Similarly, the decision of the Bombay High Court in the case of **Pamwi Tissues Ltd.** (supra) also would not be applicable to the facts of the case on hand. In the case before the Hon'ble Bombay High Court, the dispute was whether deletion of Second Proviso to section 43B would be applicable retrospectively or not and in that case the dispute was also with respect to employer's contribution.

7.11. Now, so far as the reliance placed upon the decision of the Himachal Pradesh High Court in the case of **Nipso**

Polyfabriks Ltd. (supra); decision of the Karnataka High Court in the case of **Spectrum Consultants India (P) Ltd.** (supra); decision of the Rajasthan High Court in the case of **Udaipur Dugdh Utpadak Sahakari Sandh Ltd.** (supra) and decision of the Punjab and Haryana High Court in the case of **Hemla Embroidery Mills (P) Ltd.** (supra) taking view that where the assessee deposited employees' contribution to ESI and Provident Fund before the due date of filing the return under section 139(1) of the Act, the same would be allowable as deduction, are concerned, With respect and for the reasons stated hereinabove, we are not in agreement with the view taken by the aforementioned High courts. As discussed hereinabove, as there is no amendment in Section section 36(1)(va) of the Income Tax Act and considering section 36(1)(va) of the Income Tax Act as it stands, with respect to any sum received by the assessee from any of his employees to which the provisions of clause (x) of sub-section (24) of section 2 applies, assessee shall not be entitled to deduction of such amount in computing the income referred to in section 28 if such sum is not credited by the assessee to the employees' account in the relevant fund or funds on or before the due date as per explanation to section 36(1)(va) of the Act. Merely because Second Proviso to Section 43B of the Act in which there was a reference to due date as defined in explanation below clause (va) of sub-section (1) of section 36, it cannot be held that even section 36(1)(va) is amended and/or even explanation below clause (va) of sub-section (1) of section 36 is also deleted. It can be said that there was a reference to explanation below clause (va) of sub-section (1) of section 36 in second proviso of section 43B (which has been deleted by Finance Act, 2003), only for the purpose of defining due date

as per explanation below clause (va) of sub-section (1) of section 36. Therefore, by deleting Second Proviso to section 43B by Finance Act, 2003, it cannot be said that Section 36(1)(va) is amended and/or explanation below clause (va) of sub-section (1) of section 36 is deleted, which is with respect to employees' contribution. Under the circumstances, we are not in agreement with the view expressed by the Himachal Pradesh High Court; Karnataka High Court; Rajasthan High Court and Punjab and Haryana High Court in the cases refereed to hereinabove.

7.12. Now, so far as the reliance placed upon the decision of the Hon'ble Supreme Court in the case of **Sarabhai Sons Ltd**. (supra), by the learned counsel appearing on behalf of the assessee and his submission that if two views are possible and different High Courts have taken a particular view, this Court may not take a different view, is concerned, we are of the opinion that in the present case, and as discussed hereinabove, only one view is possible as canvassed on behalf of the revenue and as observed by under section hereinabove and we are not in agreement with the view taken by the Himachal Pradesh High Court; Karnataka High Court; Rajasthan High Court and Punjab and Haryana High Court in the cases refereed to hereinabove, and therefore, the submission made on behalf of the assessee to follow the decisions of the different High Courts refereed to hereinabove and/or not to take a contrary view cannot be accepted.

8.00. In view of the above and for the reasons stated above, and considering section 36(1)(va) of the Income Tax Act, 1961 read with sub-clause (x) of clause 24 of section 2, it

is held that with respect to the sum received by the assessee from any of his employees to which provisions of sub-clause (x) of clause (24) of section (2) applies, the assessee shall be entitled to deduction in computing the income referred to in section 28 with respect to such sum credited by the assessee to the employees' account in the relevant fund or funds on or before the "due date" mentioned in explanation to section 36(1)(va). Consequently, it is held that the learned tribunal has erred in deleting respective disallowances being employees' contribution to PF Account / ESI Account made by the AO as, as such, such sums were not credited by the respective assessee to the employees' accounts in the relevant fund or funds (in the present case Provident Fund and/or ESI Fund on or before the due date as per the explanation to section 36(1)(va) of the Act i.e. date by which the concerned assessee was required as an employer to credit employees' contribution to the employees' account in the Provident Fund under the Provident Fund Act and/or in the ESI Fund under the ESI Act.

Consequently, all these appeals are allowed and the impugned judgement and orders passed by the tribunal in deleting the disallowances made by the AO are hereby quashed and set aside and the disallowances of the respective sums with respect to the Provident Fund / ESI Fund made by the AO is hereby restored. The questions raised in present appeal are answered in favour of the revenue. With this, all these appeals are allowed.

Sd/-

(M.R.SHAH, J.)

Sd/-

(R.P.DHOLARIA,J.)

Rafik