IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

J U D G M E N T

(1)DB Income Tax Appeal No.177/2011
Commissioner of Income Tax
Vs.
M/s. State Bank of Bikaner & Jaipur

(2)DB Income Tax Appeal No.272/2011
Commissioner of Income Tax
Vs.
M/s. State Bank of Bikaner & Jaipur

(3)DB Income Tax Appeal No.189/2011
Commissioner of Income Tax
Vs.
Jaipur Vidyut Vitaran Nigam Ltd.

DATE OF ORDER : 06 January, 2014

PRESENT
HON'BLE MR.JUSTICE AJAY RASTOGI
HON'BLE MR.JUSTICE J.K. RANKA

Mr.RB Mathur with
Mr.Akhilesh Simlote, for the appellant
Mr.PK Kasliwal]
Mr.Gunjan Pathak], for the respondents.
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BY THE COURT (PER HON.RANKA,J.):

1. These Income Tax Appeals u/Sec. 260A of the Income Tax Act, (for short, IT Act') are directed against the order of the Income Tax Appellate Tribunal, Jaipur (for short, 'ITAT') in ITA No.359/JP/2006, ITA No.358/JP/2006 & ITA No.825/JP/2008 dt.30/04/2010, 30/04/2010 & 24/08/2009 respectively for the Assessment Year 2002-03, 2001-02 and 2002-03 respectively.

2. Since the controversy involved is identical, these Income Tax Appeals are being decided by this common order.

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3. The appeals were admitted on the following substantial question of law:-

Substantial question of law in the case of State Bank of Bikaner & Jaipur (DB ITA 177/2011 & 272/2011)

"Whether on the facts and in the circumstances of the case, the ITAT was justified in deleting the addition made on account of depositing the PF payment beyond prescribed time, despite the fact that as per Section 36 (1)(va) employee's contribution should have been deposited in time; and Section 43B permits delayed payment as regards employer's contribution and not the employee's contribution?"

Substantial question of law in the case of JVVNL (DB ITA No.189/2011).

"Whether in the facts and circumstances of the case, the ITAT was justified in law in deleting addition made by the Assessing Officer on account of delay in deposit of employees' contribution to PF u/s 36(1)(va)."

4. The brief facts, as emerging on the face of record, are that the respondent-assessees are being assessed to income tax from year to year and the assessment stood completed originally under Section 143(3) of the IT Act in the case of SBBJ and notice u/s 154 was issued, as the Assessing Officer felt that there is a mistake apparent on the face of record.

5. In the case of the respondent-assessee—JVVNL assessment was completed u/s 143(3) of the IT Act and thereafter the respondent proceeded before the appellate authorities.

6. The issue in short is that it came to the notice of the

Assessing Officer that the respondent-assessees, though made payment of Provident Fund Account (PF) and/or EPF, CPF, GPF but it was deposited beyond the prescribed time limit under those Acts and accordingly the Assessing Officer disallowed the same. However, it may be observed that in so far as the case of the respondent-assessee-SBBJ is concerned, even the Assessing Officer has not chosen to mention under which provision of law the claim has been disallowed on account of the above facts, however, the Commissioner of Income Tax (Appeals) (for short, the ('CIT(A)') as well as the ITAT have clarified that the amount was disallowed under the provisions contained under Section 43B.

6.1 In so far as the case of the respondent-assessee-JVVNL is concerned, the Assessing Officer has certainly observed that the amount is being disallowed under the provisions of Section 43B of the IT Act.

7. It was contended by the respondent-assessee-SBBJ before the Assessing Officer that the payment was made before the due date of filing of the return of income and accordingly as per provisions of Section 43B of the IT Act, the claim was allowable. It was submitted that there is no mistake apparent on the face of record and alternatively the issue, being debatable, will not come within the purview of Section 154 of the IT Act. However, the Assessing Officer did not agree with the contention raised by the respondent-assessee and disallowed the amount as according to him, the

payments were made beyond the due date as prescribed under the relevant Act of PF etc. and once the payment was made beyond the prescribed time, then the amount had to be disallowed.

7.1 In the matter of respondent-assessee-JVVNL as well, it was submitted that there is an amendment under Section 43B of the IT Act which came into effect from 01/04/2004 and there was a submission of the respondent-assessee that it is retrospective in nature and therefore, is applicable in the facts of the present case. The Assessing Officer was not satisfied with the explanation offered by the respondent-assessee and disallowed the claim by observing that the law has to be strictly followed and at least the assessee ought to have paid the amount according to the due date under the relevant provisions of PF Act or GPF etc. and since there was violation of even those Acts, therefore, the benefit/deduction cannot be granted/allowed. Accordingly, the amounts were disallowed.

8. Dissatisfied with the said disallowance, as aforesaid, the matter was carried in appeal before the CIT(A). Before the CIT(A), same explanation was offered and it was further submitted that the payment under the PF Act could not be disallowed under Section 43B of the IT Act even as per the provision as it stood prior to the amendment w.e.f. 01/04/2004. Reliance was placed by the respondents-assessees on the judgment of the Hon'ble Apex Court in the case of CIT Vs. Vinay Cement Ltd.: (2007) 213 CTR 268

(SC) and after considering the said judgment, the CIT(A) agreed with the contention offered by the respondents-assessees and deleted the disallowance as made by the Assessing Officer.

9. Dissatisfied with the deletion of the disallowance under Section 43B of the IT Act, the matter was carried in appeal before the ITAT by the revenue. It was submitted on behalf of the revenue that the Assessing Officer had correctly disallowed the amount as per the provisions of Section 43B of the IT Act and strict compliance is required to be made in the given facts, then certainly when the amount was paid beyond the due date, then there was no occasion for the CIT(A) to come to a different conclusion. On behalf of the respondents-assessees, reliance was placed not only on the judgment of the Hon'ble Apex Court (Vinay Cement) but also a direct authority of Karnataka High Court, rendered in the case of CIT Vs. Sabari Enterprises: (2007) 213 CTR 269 (Kar.). Accordingly, after considering the submissions, the ITAT dismissed the appeals preferred by the revenue. It is these orders of the ITAT which have been assailed before us.

10. Shri RB Mathur, ld. counsel for the revenue drew attention of this Court towards provisions of Section 36(1)(va) coupled with Section 43B of the IT Act and submitted that there was no justification for allowing the claim by the ITAT as well as CIT(A) as under Section 36(1)(va) of the IT Act, the amount was to be allowed only if the amount was paid on or before the due date and

therefore, he contended that Section 43B of the IT Act would come at a later stage and the first point, which is required to be looked into, is that under Section 36(1)(va) of the IT Act, if the amount has been paid on or before the due date under the relevant Act, then certainly the deduction could have been allowed. He further submitted that as per explanation, as given under Section 36(1)(va) of the IT Act, the 'due date' means the date by which the assessee is required, as an employer to credit the employees contribution to the concerned department within due date prescribed under that Act and once it has been found as a finding of fact that the amount was not deposited on or before the due date, even the very deduction under Section 36 was not permissible and secondly, he submitted that under Section 43B also, the amount could have been allowed if the same would have been paid on or before the due date as contemplated under the relevant PF or GPF or CPF Act. He further submitted that the intention of the legislature was very clear that the amount was allowable only in cases where the amount was paid before the due date and it was for the welfare of the employees as earlier several instances came where though the amount was not paid but was claimed and therefore, this provision was brought in. Accordingly, he submitted that both the authorities have come to a wrong conclusion which is not permissible under the Act.

11. Per-contra, Shri P.K. Kasliwal and Mr. Gunjan Pathak, ld.

counsel for the respondents-assessees submitted that the ITAT, after considering all the facts, has come to the correct conclusion in analyzing the provisions contained under the Act.

12. It was further contented by them that though proviso was applicable from 01/04/2004 but it was clarified that it has to be treated as retrospective in nature. Nevertheless, they submitted that even the Hon'ble Apex Court in the case of Vinay Cement Ltd. (supra) has come to the conclusion that even the plain language of Section 43B of the Act makes it clear that even without the proviso the claim was allowable under the provisions of Section 43B of the Act and accordingly submitted that the ITAT has come to the correct conclusion and the appeal deserves to be dismissed.

13. We have heard ld. counsel for the parties. It would be fruitful to quote Sections 2(24)(x), 36(1)(va) and 43B of the IT Act which is required to be considered in the present appeals:-

> *"Section2(24)'Income' includes-*
> *(x)any sum received by the assessee from his employees as contribution to any PF 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."*
>
> *"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 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."

Section.43B-"Notwithstanding anything contained in any other provision of this Act, a deduction otherwise allowable under this in respect of-

(a)………., or

(b)any sum payable by the assessee as an employer by way of contribution to any provident fund or superannuation fund or gratuity found or any other fund for the welfare of employees,

(c)…………

(d)…………

(e)………..

(f)………..

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.

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.

Explanation(1)-For the removal of doubts, it is hereby declared that where a deduction in respect of any sum referred to in clause (a) or clause (b) of this section is allowed in computing the income referred to in section 28 of the previous year (being a previous year relevant to the assessment year commencing on the 1st day of April, 1983 or any earlier assessment year) in which the liability to pay such sum was incurred by the assessee, the assessee shall not be entitled to any deduction under this section in respect of such sum in computing the income of the previous year in which the sum is actually paid by him."

14. On perusal of the above, it transpires that Section 36(1)(va) was inserted by Finance Act, 1987 w.e.f. 01/04/1988 and explanation to this clause, if read collectively, explains to mean that the date by which the assessee is required as an employer to credit the contribution to the employees account in the relevant fund under any Act/Rule or order or notification issued thereunder or under any standing order, award, contract of service or otherwise, prior to the above, clause was inserted to Section 36 for statutory deductions of payment of tax under the provisions of the Act. Section 43B(b) was inserted by the Finance Act, 1983 which came into force w.e.f.01/04/1984. There again, provisions of Section 43B (b) clearly postulates that it is notwithstanding anything contained

in other provision of the Act including Section 36(1)(va) and even prior to insertion of the clause, assessee is entitled to get statutory benefit of deduction of payment of amount from the revenue. It may be observed that the Hon'ble Apex Court, in the case of Allied Motors (P) Ltd. vs. CIT: (1997) 224 ITR 677 (SC), considered the scheme of Section 43B and the scope of the said provision and observed thus as under:-

> *"Several cases have come to notice where taxpayers do not discharge their statutory liability such as in respect of excise duty, employer's contribution to PF, ESI Scheme, etc. for long periods of time, extending sometimes to several years. For the purpose of their income-tax assessments, they claim the liability as deduction on the ground that they maintain accounts on mercantile or accrual tests basis. On the other hand, they dispute the liability and do not discharge the same. For some reason or the other, undisputed liabilities also are not paid. To curb this practice, it is proposed to provide that deduction for any sum payable by the assessee by way of tax or duty under any law for the time being in force (irrespective of whatever such tax or duty is disputed or not) or any sum payable by the assessee as an employer by way of contribution to any PF, or superannuation fund or gratuity fund or any other fund for the welfare of employees shall be allowed only in computing the income of that previous year in which such sum is actually paid by him."*
>
> *"Sec.43B was, therefore, clearly aimed at curbing*

the activities of those taxpayers, who did not discharge their statutory liability of payment of excise duty, employer's contribution to PF, etc., for long periods of time but claimed deductions in that regard from their income on the ground that the liability to pay these amounts had been incurred by them in the relevant previous year. It was to stop this mischief that S. 43B was inserted. It was clearly not realised that the language in which S.43B was worded, would cause hardship to those taxpayers who had paid sales-tax within the statutory period prescribed for this payment, although the payment so made by them did not fall in the relevant previous year. This was because the sales-tax collected pertained to the last quarter of the relevant accounting year. It could be paid only in the next quarter which fell in the next accounting year. Therefore, even when the sales-tax had in fact been paid by the assessee within the statutory period prescribed for its payment and prior to the filing of the IT return, these assessees were unwillingly prevented from claiming a legitimate deduction in respect of the tax paid by them. This was not intended by s.43B. Hence, the first proviso was inserted in s.43B. The amendment which was made by the Finance Act of 1987 in s.43B by inserting, inter alia, the first proviso, was remedial in nature, designed to eliminate unintended consequences which may cause undue hardship to the assessee and which made the provision unworkable or unjust in a specific situation."

15. The Hon'ble Apex Court, in the case of Vinay Cement Ltd. (supra), after approving the judgment rendered by Gauhati High

Court in the case of CIT Vs. George Williamson (Assam) Ltd.: (2006) 284 ITR 619 (Gau), came to the conclusion that such omission under Section 43B(b), without any saving clause of the General Clauses Act, means that the above provisions namely; Clause (a) or (c) or (d) or (e) or (f) were not in existence or never existed and after considering the judgments rendered by the Hon'ble Apex Court in the case of Kolhapur Canesugar Works Ltd. vs. Union of India, reported in (2000) 2 SCC 536 and Rayala Corporation (P) Ltd. vs. Director of Enforcement, reported in (1969) 2 SCC 412, held the claim of the assessee as allowable. The Hon'ble Apex Court, as aforesaid, approving the judgment of Gauhati High Court, has held as under:-

> *"In the present case we are concerned with the law as it stood prior to the amendment of s.43B. In the circumstances the assessee was entitled to claim the benefit in s.43B for that period particularly in view of the fact that he has contributed to provident fund before filing of the return."*

16. The Hon'ble Apex Court, in the case of Commissioner of Income Tax Vs. M/s. Alom Extrusions Limited: (2009) 319 ITR 306 (SC), while considering the scope of the amendment made w.e.f. 01/04/2004, observed that the same is curative in nature, hence it is retrospective in nature and would operate w.e.f. 01/04/1988 (when the first proviso came to be inserted) and after discussing this, held as under:-

> *"Before concluding, we extract hereinbelow the relevant observations of this Court in the case of Commissioner of Income Tax, Bangalore vs. J.H. Gotla, reported in [1985] 156 I.T.R. 323, which reads as under:*
> *"We should find out the intention from the language used by the Legislature and if strict literal construction leads to an absurd result, i.e., a result not intended to be subserved by the object of the legislation found in the manner indicated before, then if another construction is possible apart from strict literal construction, then that construction should be preferred to the strict literal construction. Though equity and taxation are often strangers, attempts should be made that these do not remain always so and if a construction results in equity rather than injustice, then such construction should be preferred to the literal construction."*
>
> *For the afore-stated reasons, we hold that Finance Act, 2003, to the extent indicated above, is curative in nature, hence, it is retrospective and it would operate with effect from 1st April, 1988 (when the first proviso came to be inserted). For the above reasons, we find no merit in this batch of civil appeals filed by the Department which are hereby dismissed with no order as to costs."*

17. Similarly, the Gauhati High Court, in the case of CIT Vs. Assam Tribune: (2002) 253 ITR 93 (Gau), came to the similar conclusion that the contribution towards the PF etc. having been deposited before filing of the return by the assessee, deduction could not be

disallowed under Section 43B of the Act.

18. The Delhi High Court, in the case of CIT Vs. Dharmendra Sharma: (2007) 213 CTR 609 (Del.); Madras High Court, in the case of CIT Vs. Nexus Computer (P) Ltd., reported in (2008) 219 CTR (Mad.) 54; Delhi High Court, in the case of CIT Vs. P.M. Electronics Ltd., reported in (2008) 220 CTR (Del) 635; Karnataka High Court, in the case of CIT Vs. Kurlon Ltd., reported in (2011) 203 Taxman 29 (Kar.); Himachal Pradesh High Court, in the case of CIT Vs. Nipso Polyfabriks Ltd., reported in (2013) 213 Taxman 376 (Himachal Pradesh) also came to the aforesaid view.

19. Uttrakhand High Court, in the case of CIT Vs. M/s. Kichha Sugar Company Ltd., reported in (2013) 356 ITR 351 (Uttaranchal), after considering the aforesaid provisions, held as under:-

> *"Therefore, the due date referred to in section 36(1) (va) of the Act must be read in conjunction with section 43B(b) of the Act and a reading of the same would make it amply clear that the due date as mentioned in Section 36(1)(va), is the due date as mentioned in section 43B(b) i.e. payment/contribution made to the Provident Fund Authority any time before filing the return for the year in which the liability to pay accrued alongwith evidence to establish payment thereof. The Assessing Officer proceeded on the basis that "due date", as mentioned in section 36(1)(va) of the Act, is the due date fixed by the Provident Fund Authority, whereas in the matter of culling out the meaning of the word "due date", as mentioned in the said section, the*

Assessing Officer was required to take note of Section 43B(b) of the Act and by not taking note of he provisions contained therein committed gross error, which having been rectified by the Appellate Authority and confirmed by the Tribunal, there is no scope of interference"

20. On perusal of Sec.36(1)(va) and Sec.43(B)(b) and analyzing the judgments rendered, in our view as well, it is clear that the legislature brought in the statute Section 43(B)(b) to curb the activities of such tax payers who did not discharge their statutory liability of payment of dues, as aforesaid; and rightly so as on the one hand claim was being made under Section 36 for allowing the deduction of GPF, CPF, ESI etc. as per the system followed by the assessees in claiming the deduction i.e. accrual basis and the same was being allowed, as the liability did exist but the said amount though claimed as a deduction was not being deposited even after lapse of several years. Therefore, to put a check on the said claims/deductions having been made, the said provision was brought in to curb the said activities and which was approved by the Hon'ble Apex Court in the case of Allied Motors (P) Ltd. (supra).

21. A conjoint reading of the proviso to Section 43-B which was inserted by the Finance Act, 1987 made effective from 01/04/1988, the words numbered as clause (a), ©, (d), (e) and (f), are omitted from the above proviso and, further more second proviso was removed by Finance Act, 2003 therefore, the deduction towards the

employer's contribution, if paid, prior to due date of filing of return can be claimed by the assessee. In our view, the explanation appended to Section 36(1)(va) of the Act further envisage that the amount actually paid by the assessee on or before the due date admissible at the time of submitting return of the income under Section 139 of the Act in respect of the previous year can be claimed by the assessee for deduction out of their gross total income. It is also clear that Sec.43B starts with a notwithstanding clause & would thus override Sec.36(1) (va) and if read in isolation Sec. 43B would become obsolete. Accordingly, contention of counsel for the revenue is not tenable for the reason aforesaid that deductions out of the gross income for payment of tax at the time of submission of return under Section 139 is permissible only if the statutory liability of payment of PF or other contribution referred to in Clause (b) are paid within the due date under the respective enactments by the assessees and not under the due date of filing of return.

22. We have already observed that till this provision was brought in as the due amounts on one pretext or the other were not being deposited by the assessees though substantial benefits had been obtained by them in the shape of the amount having been claimed as a deduction but the said amounts were not deposited. It is pertinent to note that the respective Act such as PF etc. also provides that the amounts can be paid later on subject to payment

of interest and other consequences and to get benefit under the Income Tax Act, an assessee ought to have actually deposited the entire amount as also to adduce evidence regarding such deposit on or before the return of income under sub-section (1) of Section 139 of the IT Act.

23. Thus, we are of the view that where the PF and/or EPF, CPF, GPF etc., if paid after the due date under respective Act but before filing of the return of income under Section 139(1), cannot be disallowed under Section 43B or under Section 36(1)(va) of the IT Act.

24. Accordingly, the substantial question of law is answered against the appellant-revenue and in favour of the assessee.

25. Consequently, these appeals, being devoid of merit, are hereby dismissed. No order as to costs.

[J.K. RANKA],J [AJAY RASTOGI],J.

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Certificate:All corrections made in the judgment/order have been incorporated in the judgment/order being e-mailed.
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