

IN THE HIGH COURT OF KARNATAKA AT BANGALORE

DATED THIS THE 4<sup>th</sup> DAY OF FEBRUARY 2014

PRESENT

**THE HON'BLE MR. JUSTICE DILIP B BHOSALE**

AND

**THE HON'BLE MR. JUSTICE B MANOHAR**

**ITA.NO.480/2013**

BETWEEN

M/S. ESSAE TERAOKA PVT. LTD  
377/22, 6TH CROSS  
WILSON GARDEN  
BANGALORE - 560 001  
REPRESENTED BY ITS MANAGING DIRECTOR  
SRI PRABHU CHANDAN  
AGED ABOUT 43 YEARS  
SON OF SRI S A CHANDRAN

PRESENT ADDRESS:  
ESSAE TERAOKA LTD.  
410, 100' ROAD  
4<sup>TH</sup> BLOCK, KORAMANAGALA  
BANGALORE 560034

... APPELLANT

(BY SRI S PARTHASARATHI, ADV., A/W SRI K MALHARA RAO,  
ADV.,)

AND

THE DEPUTY COMMISSIONER OF INCOME-TAX  
CIRCLE 11(3), 14/3, RASTROTHANA BHAVAN  
4TH FLOOR, NRUPATHUNGA RAOD, OPP RBI  
BANGALORE - 560001

... RESPONDENT

(BY SRI K V ARAVIND, ADV.,)

THIS ITA FILED UNDER SEC.260-A OF INCOME TAX ACT 1961, ARISING OUT OF ORDER DATED 31/05/2013 PASSED IN ITA NO.785/BANG/2012, FOR THE ASSESSMENT YEAR 2008-09, PRAYING TO: I. FORMULATE THE SUBSTANTIAL QUESTIONS OF LAW STATED THEREIN, II. ALLOW THE APPEAL AND SET ASIDE THE ORDER PASSED BY THE ITAT, BANGALORE IN ITA NO.785/BANG/2012 DATED 31/05/2013, ANNEXURE-A.

THIS ITA COMING ON FOR ADMISSION, THIS DAY, *Dilip B. Bhosale J.* DELIVERED THE FOLLOWING:

PC:

This Income Tax Appeal, filed under Section 260A of the Income Tax Act, 1961 (for short '**the IT Act**'), is directed against the order dated 31.05.2013 passed by the Income Tax Appellate Tribunal, Bangalore Bench "A" (for short '**the Tribunal**') in ITA No.785/Bang/2012 pertaining to the Assessment Year 2008-09, whereby the Tribunal allowed the revenue's appeal and set aside the order dated 20.03.2012 passed by the Commissioner of Income Tax-I, Bangalore (for short the '**First Appellate Authority or FAA**') in ITA No.247/Bang/DC-113/A-1/Co-11. The appeal before the FAA was directed against the assessment order dated 24.12.2010 for the Assessment Year 2008-09.

2. The assessee is a Company registered under the Companies Act, 1956. The assessee had filed its return of income for the Assessment Year 2008-09 on 26.09.2008 declaring income of ₹14,45,13,900/-. The return was processed under Section 143(1) of the IT Act and the case was taken up for scrutiny by issue of notice under Section 143(2) thereof on 13.08.2009. The Assessing Officer (for short '**the AO**') after examining the case, completed the assessment by an order under Section 143(3) of the IT Act on 24.12.2010 determining the income of the assessee at ₹14,58,70,258/- wherein he made the following disallowances: (i) Disallowance u/s.36(1)(va) of ₹12,51,737/- (ii) Disallowance u/s.14A r/w Rule 8D of ₹1,04,621/-.

In the present appeal, we are concerned only with the Disallowance under Section 36(1)(va) of the IT Act.

3. We have heard learned counsel for the parties for final disposal of the appeal at the stage of admission and even before the arguments were advanced, with their

assistance, the following substantial question of law was framed:

**"Whether in law, the Tribunal was justified in affirming the finding of Assessing Officer in denying the appellant's claim of deductions of the employees contribution to PF/ESI alleging that the payment was not made by the appellant in accordance with the provisions 36(1)(va) of the IT Act?"**

4. At the outset, Mr.Parthasarathi, learned counsel for the appellant-assessee, invited our attention to the order of this Court dated 09.12.2013 passed by the Division Bench in W.A.No.4077/2013 and submitted that the question raised in this appeal is squarely covered by this order.

5. On the other hand, Mr.Aravind, learned counsel appearing for the respondent-revenue, invited our attention to the Judgment of the High Court of Gujarat in **Commissioner of Income-tax-II vs. Gujarat State Road Transport Corporation (2014) 41 Taxmann.com 100 (Gujarat)** and endeavoured to persuade us to take a

deferring view from the one taken by the Division Bench in W.A. No.4077/2013.

6. We have perused both the Judgments. This Court, after considering the relevant provisions not only of the IT Act but also of The Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (for short '**the PF Act**') and The Employees' Provident Funds Scheme, 1952 (for short '**the PF Scheme**'), in paragraph-8 thereof observed thus:

"A reading of the aforesaid provisions makes it clear that the contributions payable by the employer under the scheme shall be at the rate of 10% of the basic wages, Dearness Allowance. The contribution payable by the employee shall be equal to the contribution payable by the employer in respect of such employee. However, the employer shall, in the first instance, pay both the contribution payable by himself i.e., the employer's contribution as well as the employee's contribution and thereafter he is entitled to recover by means of deduction from the employee the contribution which he has paid as employee's contribution. Therefore, in law, the payment of contribution by the employer to the fund under the scheme means both employer's contribution and employee's contribution. Whether he deducts the employee's contribution from the salary or not,

in law, he is liable to pay the said amount. Therefore, Section 2(24)(x) of the Act makes it clear that the employee's contribution which the employer deducts from his salary before it is paid into the fund, is treated as the income of the employer, and the employer by contributing can get the deduction. That payment must be made within the due date i.e., the due date prescribed under Section 139(1) of the Act. Because it was causing lot of problem as discussed in the judgment of the Apex Court, on a representation made by the industry, subsequent amendment was carried out to mitigate the difficulties caused to the employer under Section 43B of the Act. Though such contributions are not paid within the time prescribed under the relevant act, if those contributions are paid before the due date prescribed under Section 139(1) of the Act, the employer shall be entitled to the deductions as provided under Section 36(1) of the Act. While extending such benefit, the Parliament has not made any distinction between the employee's contribution and the employer's contribution. It is for the simple reason, under the provident fund scheme, an employer has to pay both the contribution and then recover from the salary of the employee. Therefore, in view of the aforesaid judgment, we do not find any substance in this appeal. Therefore, the appeal is dismissed."

7. The Gujarat High Court in **Gujarat State Road Transport Corporation** (supra) considered the question with respect to the disallowance of the amount

being employees' contribution to PF Account/ESI Contribution which admittedly the assessee did not deposit with the PF Department/ESI Department on or before the due date under the PF Act and/or ESI Act.

8. The Gujarat High Court also considered the relevant provisions of the Income Tax Act and so also the provisions of other relevant Acts and answered this question in favour of the revenue. The relevant observations made in paragraph - 7.6 read thus:

"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."

9. Sub-section (24) of Section 2 of the IT Act defines "income". Clause(x) of sub-section (24) of Section 2 of the IT Act provides that income includes 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 Employees' State Insurance Act, 1948 (34 of 1948), or any other fund for the welfare of such employees.

10. On the basis of this provision, Mr.Aravind, learned counsel for the revenue, vehemently submitted that the employees' contribution to provident fund is also



an income of the employer till he deposits the said amount along with his contribution with the fund, as contemplated under the provisions of the Section 36(1)(va) of the IT Act.

11. From bare perusal of this provision, we do find ourselves in agreement with Mr.Aravind, learned counsel for the revenue. But, in our opinion, that by itself is not sufficient to hold that the employer is not entitled for deduction as contemplated under Section 36(1)(va) of the IT Act r/w Section 43-B of the IT Act.

12. Section 36 provides for other deductions. Sub-section(1), thereof states that 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. We are concerned with Clause (va) of sub-section(1) of the Section 36 of the IT Act. It provides 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. In the explanation appended to Clause(va) defines "due date". It means the date on or before which the employer is supposed to deposit the "contribution" as contemplated within the time stipulated under the provisions of the PF Scheme or under the provisions of the ESI Act.

13. Thus, from bare perusal of Clause(va) of Section 36(1) of the IT Act, it is clear that any sum received by the assessee-employer from any of his employees towards the employees' contribution as contemplated by sub-para (1) of paragraph-29 of the PF Scheme and if it is deposited with relevant provident fund or fund under the provisions of ESI Act, the assessee is straightaway entitled for deduction as contemplated by Section 36(1)(va) of the IT Act, without any difficulty whatsoever, if he deposits employees' as well as his own contribution within the time stipulated under the provisions of PF Act and the PF Scheme/ESI Act.

14. Section 43-B of the IT Act provides for certain deductions to be allowable only on actual payment. We

have perused Section 43-B of the IT Act very carefully.

The relevant portion of the said Section, for our purpose, reads thus:

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

(a)xxxxxx

(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,

(c) xxxxxx

(d) xxxxxx

(e) xxxxxx

(f) xxxxxx

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."

15. From bare perusal of this provision, it is clear that under the provision, for IT Act, an extension is given to the employer to make payment of contribution to provident fund or any other fund till the "due date" applicable for furnishing the return of income under subsection(1) of section 139 of the IT Act 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. In short, this provision states, notwithstanding anything contained in any other provision contained in this Act, a deduction otherwise allowable in this Act in respect of any sum payable by the assessee as an employer by way of contribution to any fund such as provident fund shall be allowed if it is paid on or before the due date as contemplated under Section 139(1) of the IT Act. This provision has nothing to do with the consequences, provided for under the PF Act/PF Scheme/ESI Act, for not depositing the "contribution" on or before the due dates therein.

16. In the present case, admittedly, though the employer did not deposit the contribution, within the stipulated time, as contemplated by paragraph-30 of the PF Scheme or before the due date under the provisions of the PF scheme/Act, he deposited the contribution to the PF/ESI fund before the due date contemplated under Section 139(1) of the Act.

17. Section 6 of the PF Act provides for contributions and matters which may be provided for in Schemes. Paragraph-29 of the PF Scheme states what is "Contribution". The expression "contribution" is also defined under the PF Act by Section 2(c) of the PF Act, which means a contribution payable in respect of a member under the Scheme or the contribution payable in respect of an employee to whom the Insurance Scheme applies. If this definition is read with sub-para(1) of paragraph-29 in Chapter-V of the PF Scheme, it would mean that the contributions payable by the employer under the Scheme shall be at a particular rate and the contribution payable by the assessee shall be equal to the contribution payable by the employer.

18. Paragraph-30 of the PF Scheme provides for payment of contributions. Sub-para(1) of paragraph-30 states that the employer shall, in the first instance, pay both the contribution payable by himself (in this Scheme referred to as the employer's contribution) and also, on behalf of the member employed by him directly or by or through a contractor, the contribution payable by such member (in this Scheme referred to as the member's contribution).

19. From bare perusal of sub-para(1) of paragraph-30, it is clear that the word "contribution" is used not only to mean contribution of the employer but also contribution to be made on behalf of the member employed by the employer directly.

20. Paragraph-38 of the PF Scheme provides for Mode of payment of contributions. As provided in sub-para(1), the employer shall, before paying the member, his wages, deduct his contribution from his wages and deposit the same together with his own

contribution and other charges as stipulated therein with the provident fund or the fund under the ESI Act within fifteen days of the closure of every month pay. It is clear that the word "contribution" used in Clause(b) of Section 43-B of the IT Act means the contribution of the employer and the employee. That being so, if the contribution is made on or before the due date for furnishing the return of income under sub-section(1) of Section 139 of the IT Act is made, the employer is entitled for deduction.

21. The submission of Mr.Aravind, learned counsel for the revenue that if the employer fails to deduct the employees' contribution on or before the due date, contemplated under the provisions of the PF Act and the PF Scheme, that would have to be treated as income within the meaning of Section 2(24)(x) of the IT Act and in which case, the assessee is liable to pay tax on the said amount treating that as his income, deserves to be rejected.



22. With respect, we find it difficult to endorse the view taken by the Gujarat High Court. We agree with the view taken by this Court in W.A.No.4077/2013.

23. In the result, ***the appeal is allowed*** and the substantial question of law framed by us is answered in favour of the appellant-assessee and against the respondent-revenue. There shall be no order as to costs.

Sd/-  
JUDGE

Sd/-  
JUDGE

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