IN THE HIGH COURT OF JUDICATURE FOR

RAJASTHAN AT JODHPUR

D.B.INCOME TAX APPEAL NO. 55 / 2009

M/S CENTRAL OFFICE MEWAR PALACE ORGANIZATION PVT. LTD., CITY PALACE, UDAIPUR.

----Appellant

Versus

THE JOINT COMMISSIONER OF INCOME-TAX, RANGE-2 UDAIPUR

----Respondent

Connected With

D.B.INCOME TAX APPEAL No. 54 / 2009

M/S CENTRAL OFFICE MEWAR PALACE ORGANIZATION PVT. LTD., CITY PALACE, UDAIPUR

----Appellant

Versus

THE ASSISTANT COMMISSIONER OF INCOME TAX, CIRCLE-II, UDAIPUR.

----Respondent

For Appellant : Mr.N.M.Ranka, Senior Advocate with
Mr.N.K.Jain

For Respondent : Mr.K.K.Bissa

HON'BLE MR. JUSTICE SANGEET LODHA

HON'BLE MR. JUSTICE DEEPAK MAHESHWARI

Judgment

Per Hon'ble Mr.Sangeet Lodha,J.

Reportable **Dated: 5th January, 2017.**

1. These two appeals arising out of the order dated 19.12.07

passed by the Income Tax Appellate Tribunal ('ITAT'), Jodhpur Bench, Jodhpur in Income Tax Appeal No.131/JDPR/2005 and 159/JDPR/2007 for the Assessment Year 2001-02 and 2002-03 respectively, involving common question of facts and law, were heard together and are being disposed of by this common order.

2. The facts relevant are: The appellant assessee filed the return of income for the Assessment Year 2001-02 claiming deduction of Rs.23,03,071/- on account of payment of contribution to Provident Fund (PF) and Rs.3,30,828/- on account of payment to Employees State Insurance (ESI) Fund. Admittedly, the employee's contribution and employer's contribution both were not deposited by the appellant assessee before the due date by which the assessee is required as an employer to credit contribution to the employee's account in the relevant fund under the relevant statute, however, the amount was actually paid by the assessee before the due date applicable in its case for furnishing the return of income under sub-section (1) of Section 139 of the Income Tax Act, 1961 (for short "the Act") in respect of the previous year in which the liability to pay such sum was incurred and the evidence of such payment was furnished alongwith the return.

3. The Assessing Officer vide assessment order dated 23.3.04 disallowed the deduction claimed by the assessee

towards the deposit of employee's contribution to the said funds, observing that as per provisions of Section 36 (1) (va) of the Act, if employee's contribution to PF and ESI is not credited to the employee's account on or before the due date, the same being included in income under provisions of Section 2(24) (x) of the Act is liable to be taxed. However, on application being filed on behalf of the assessee under Section 154 of Act, the total disallowance was reduced to Rs.6,35,092/-.

4. Aggrieved by the assessment order, the assessee preferred an appeal before Commissioner of Income Tax (Appeals) [CIT(A)], Udaipur. The CIT(A) dismissed the appeal vide order dated 4.1.05.

5. Aggrieved by the order passed by the CIT (A), the assessee preferred second appeal before the ITAT. After due consideration, the ITAT allowed the appeal vide order dated 23.6.06, holding that the amendment in proviso to Section 43B of the Act made vide Finance Act, 2003 is retrospective and therefore, the payment having been made before the closure of financial year, the deduction as claimed could not have been disallowed. However, the Assistant Commissioner of Income Tax Circle-I, Udaipur preferred an application, relying upon a Bench decision of this court in the case of *Commissioner of Income Tax vs. Udaipur Distillery Company Ltd.*, (2004) 187 CTR 369

and a decision of Madras High Court in the case of '*Additional Commissioner of Income Tax Madras-II vs. Madras Radiators and Pressing Limited*, (2003) 183 CTR 322. Relying upon the said decisions, the ITAT recalled the order dated 23.6.06 and restored the appeal to its original number.

6. After re-hearing, vide order dated 19.12.07, the ITAT sustained disallowance in respect of employee's contribution but allowed the deduction towards employer's contribution observing that assessee was entitled to claim benefit under Section 43B of the Act, keeping in view the fact that it has contributed to PF before filing of the return.

7. Similar is the view taken by the ITAT regarding the deduction claimed by the assessee for the Assessment Year 2002-03. Hence, these appeals.

8. The appeals were admitted by a Bench of this court vide order dated 17.7.09 on following substantial question of law arising out of the order impugned passed by the ITAT:

> "Whether the contribution of the employee as received by the employer in accordance with the provisions of Provident Fund Act, or other allied laws, which is covered by Section 2 (24) (x), can also be said to fall within the expression mentioned in Section 43B(b) as "sum payable by the assessee as an employer".

9. Learned counsel Mr.N.M.Ranka, Senior Advocate appearing on behalf of the appellants contended that in view of amendment made in Section 43B, vide Finance Act, 2003, by

which the second proviso to Section 43B stands deleted, the deduction has to be allowed even in respect of employee's contribution, notwithstanding the provisions of Section 36(1) (va) and explanation attached thereto, if the contribution 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. Learned counsel while relying upon a Bench decision of this court in State Bank of Bikaner & Jaipur's case (supra), submitted that the question arising for consideration of this court in these appeals out of the order impugned passed by the ITAT is no more *res integra*. In support of the contention, learned counsel also relied upon the decisions of the Hon'ble Supreme Court in the matter of "*CIT vs. Alom Extrusions Ltd.*" (2009) 319 ITR 306 (SC) and "*CIT vs. Vinay Cement Ltd.,* (2009) 313 ITR-St.1 and the decisions of Karnataka High Court in "*CIT vs. Sabari Enterprises",* (2008) 298 ITR 141, Gauhati High Court in "*CIT vs. George Williamson (Assam) Ltd.",* (2006) 284 ITR 619 , Uttrakhand High Court in "*CIT vs. Desh Raksha Aushdhalaya Ltd.",* (2009) 313 ITR 140 & "*CIT vs. Kiccha Sugar Co. Ltd.",* (2013) 356 ITR 351, Madras High Court in "*CIT vs. Nexus Computer P. Ltd.",* (2009) 321 ITR 144 and Delhi High Court in "*CIT vs. AIMIL Ltd.",* (2010) 321 ITR 508. Learned counsel

submitted that the expression 'contribution' as used in proviso to Section 43B includes employer's contribution and employee's contribution both and therefore, the assessee having deposited the employee's contribution before the due date for filing the return under Section 139 of the Act, the deduction has wrongly been disallowed by the ITAT. In support of the contention, learned counsel has relied upon a decision of the Karnataka High Court in the matter of "*Essae Teraoka P. Ltd. vs. D.C.I.T.",* (2014) 366 ITR 408.

10. On the other hand, the counsel appearing for the Revenue submitted that as per provisions of Section 2(24)(x) of the Act, any sum received by the assessee from his employees as contribution to any provident fund or superannuation fund or fund set up under the provisions of Employees' State Insurance Act, 1948 (for short "the ESI Act") or any other fund for welfare of such employee shall be treated as an income and therefore, by virtue of provisions of Section 36 of the Act while computing the income referred to in Section 28, the deduction is allowable only if such sum received by the assessee from any of his employee is credited to the employee's account in the relevant fund or funds on or before the due date i.e. date by which assessee is required as an employer to credit the employee's contribution to the employee's account in the relevant fund under the relevant statute. Learned counsel submitted that

Section 36 (1) (va) and Section 43B (b) operate in different fields and therefore, the contention sought to be raised that the expression 'contribution' used in provisions of Section 43B (b) refers to employer's contribution and employee's contribution both is absolutely fallacious. Learned counsel submitted that the provisions of Section 36(1) (va) deals with employee's contribution, whereas Section 43B(b) deals with employer's contribution and therefore, the view taken by the ITAT cannot be faulted with. Learned counsel submitted that in decisions of various High Courts relied upon by the learned counsel for the appellant, the question with regard to the scope of provisions of Section 36 (1) (va) and Section 43B did not come up for consideration. Relying upon the decision of Kerala High Court in the matter of "*Commissioner of Income Tax, Cochin vs. Merchem Ltd.",* (2015) 378 ITR 443, learned counsel submitted that if the contention raised on behalf of the assessee is accepted it will render the explanation attached to Section 36 (1) (va) redundant. Learned counsel submitted that both the provisions operating in different fields have to be given effect to and therefore, the assessee having failed to deposit the employee's contribution towards PF and ESI before the due date i.e. the date by which the assessee was required to as an employer to credit an employee's contribution to the employee's account in the relevant fund under the relevant statute is not

entitled to deduction while computing its income under Section 28 of the Act.

11. Replying the contentions raised on behalf of the Revenue, learned counsel for the appellant submitted that the question with regard to applicability of the provisions of Section 43B (b) as it stands after deletion of second proviso has been specifically dealt with by the various High Courts and therefore, the contention of the Revenue that the question arising in the present appeals is not dealt with by various High Courts specifically is absolutely devoid of any merit. Learned counsel reiterated that a bare perusal of the decision of this court in State Bank of Bikaner & Jaipur's case (supra) reveals that the question of law arising in the instant appeals already stand decided after due consideration. Learned counsel submitted that the decision of the Gauhati High Court dealing with an identical issue having been upheld by the Hon'ble Supreme Court while rejecting the Special Leave Petition by a speaking order, the said decision is a binding precedent which has to be followed by this court.

12. We have considered the rival submissions and perused the material on record.

13. Indisputably, any sum received by the assessee from its 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 welfare of such employee shall stand included within the income of the assessee by virtue of provisions of Section 2(24)(x) of the Act. However, while computing income chargeable to income tax under the head "Profit and Gains of Business and Profession" in terms of Section 28 of the Act, any sum received by the assessee as aforesaid which is treated to be his income under Section 2 (24)(x) of the Act shall be liable to be deducted under Section 36 (1)(va) of the Act, if such sum received is credited by the assessee to the employee's account in the relevant fund or funds on or before the due date i.e. the date by which 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. To put in other words, the assessee shall not be entitled for deduction under Section 36(1) (va) of the Act in computing the income referred to under Section 28 of the Act, in respect of the sum received as employee's contribution if he has not credited the said sum to the employee's account in the relevant fund or funds on or before the due date mentioned in explanation to Section 36 (1) (va) of the Act.

14. But then, the question which arises for consideration in these appeals is whether the provisions of Section 43B as it

stands after deletion second proviso thereto by Finance Act, 2003, permitting certain deductions on actual payment, can be applied for allowing the deductions in respect of the employee's contribution towards the relevant fund or funds received by the assessee not credited to the employee's account on or before the due date as contemplated under explanation attached to Section 36 (1) (va) of the Act but 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 and the evidence of such payment is furnished by the assessee alongwith such return.

15. It is to be noticed that Section 43B, a non obstante clause, shall be operative irrespective of other provisions of the Act in respect of the deductions specified, which are otherwise allowable under the Act. As per clause (b) of Section 43B read with proviso to Section 43B, 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 shall be an allowable deduction if such sum 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 in respect of previous year in which liability to pay such sum was incurred as aforesaid and

the evidence of such payment is furnished by the assessee alongwith such return.

16. In the instant cases, it is not disputed that the assessee has deposited the employee's contribution and employer's contribution both in respect of the liability incurred in the previous year but the contention of the Revenue is that the employee's contribution to the relevant funds is not covered by clause (b) of Section 43B and therefore, the ITAT has erred in allowing the deduction in respect thereof invoking the provisions of Section 43B.

17. It is pertinent to note that as per para 30 of the Employees' Provident Fund Scheme, 1952 as framed by the Central Government, in exercise of the powers conferred by Section 5 of the Employees' Provident Fund Act, 1952 (for short "PF Act"), it is the employer's liability in the first instance, to pay both the contribution payable by himself referred to as employer's contribution in the Scheme and also the contribution payable on behalf of the member employed by him directly or through a contractor. Of course, the contribution payable by the employee paid by the employer or a contractor is recoverable by means of deductions from the wages of the employee and not otherwise. But in any case, the payment of employee's contribution by the employer on or before the due date as specified under the relevant statute is not dependent upon the

actual deduction from the employee's wages, by the employer or the contractor who in its turn is required to pay the amount deducted to the principal employer. Similarly, as per provisions of Section 39 of the ESI Act, the contribution payable under the said Act in respect of an employee shall comprise contribution payable by the employer and contribution payable by the employee, a member of ESI Scheme. Further, Section 40 of ESI Act mandates that the principal employer shall pay the contribution in respect of every employee whether directly employed by him or by or through an immediate employer, both the employer's contribution and employee's contribution. The principal employer is entitled to recover from employee the employee's contribution by deduction from his wages and in case of an employee employed through an immediate employer, as per provisions of Section 41 of the ESI Act, the principal employer is entitled to recover the amount of employer's contribution as well as employee's contribution from the immediate employer either, by deduction from any amount payable or as debt payable by the immediate employer. But in any case, both under PF fund and ESI Scheme as created under the relevant statutes, it is the duty of the principal employer to make payment of the contributions comprising of the employer's contribution and employee's contribution and the payment of employee's contribution by the principal employer is

not dependent on such sum being actually received from the employees.

18. In the backdrop of the provisions of the PF Act and ESI Act discussed hereinabove, adverting to the provisions of Section 43B of the Act, it is pertinent to note that the clause (b) thereof refers to 'sum payable by the assessee as an employer by way of contribution' to any provident fund, superannuation fund or gratuity fund or any other fund for the welfare of the employees. As discussed hereinabove, under the relevant statutes, both the employer's contribution and employee's contribution is required to be paid by the employer before the due date and therefore, the expression 'sum payable by the assessee as an employer by way of contribution' as used in Section 43B (b) cannot be given restricted meaning as suggested by the Revenue so as to include within its ambit, only the employer's contribution and not the both the employer's contribution and the employee's contribution. Thus, we are of the considered opinion that the provisions as incorporated in Section 43B (b) allowing deduction in respect of any sum payable by the assessee as an employer by way of contribution to provident fund etc. include both the employer's contribution and the employee's contribution, if the same 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 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 alongwith such return.

19. Having gone through the decisions cited at the bar, we are of the opinion that the contention sought to be raised by the Revenue that the question with regard to entitlement of the assessee for deduction in respect of the employee's contribution under Section 43B has not been dealt with in the decisions rendered by the various High Courts is not correct. In some of the decisions, the question with regard to applicability of the provisions of Section 43B vis-a-vis the provisions of Section 36 (1) (va) of the Act dealing with employee's contribution has been specifically dealt with.

20. In State Bank of Bikaner & Jaipur's case (supra), while specifically dealing with the question with regard to the entitlement of the assessee for deduction in respect of the employee's contribution to PF fund paid beyond the due date as mentioned in explanation to Section 36(1)(va) of the Act, a Bench of this court relying upon the decisions of Supreme Court in Alom Extrusions Ltd.'s case (supra) and Vinay Cement's case (supra), categorically held that contributions to provident fund, contributory provident fund and general provident fund etc. if paid after the due date under the respective Acts but before

filing of the return of income under Section 139(1) could not be disallowed under Section 43B or under Section 36(1)(va) of the Act.

21. In Sabari Enterprises case (supra), the Karnataka High Court while dealing with the question whether the contributions made by the assessee to PF and ESI are allowable deduction even though it is made beyond the stipulated period as contemplated under mandatory provisions of Section 36 (1)(va) read with Section 2(24) (x) and Section 43B of the Act, held that the provisions of Section 43B (b) clearly provides that notwithstanding anything contained in the other provisions of the Act including Section 36(1) clause (va) of the Act, even prior to insertion of that clause the assessee is entitled to get statutory benefit of deduction. The court observed that the explanation to clause (va) of Section 36(1) of the Act further makes it very clear that the amount actually paid by the assessee on or before the due date applicable i.e. at the time of submitting returns of income under Section 139 of the Act to the Revenue in respect of the previous year can be claimed by the assessees for deduction out of their gross income.

22. In Alom Extrusions Ltd.'s case (supra), the Hon'ble Supreme Court held that the Finance Act 2003 deleting the second proviso to Section 43B of the Act is curative in nature and would operate retrospectively i.e. with effect from 1.4.88.

23. In Desh Rakshak Aushdhalaya Ltd's case (supra), the Uttrakhand High Court while dealing with the question regarding the entitlement of the assessee for deduction of the amount deposited in relation to employee's contribution towards provident fund with delay, upheld the order of the ITAT deleting the addition made in this regard by the AO, relying upon the decision of the Hon'ble Supreme Court in the matter of *"Allied Motors Private Limited vs. CIT"* (1997) 224 ITR 677 (SC) holding that the deletion of second proviso to Section 43B of the Act simply removes ambiguity and being curative in nature, impliedly has retrospective effect.

24. In Kichha Sugar Co. Ltd's case (supra), the Uttrakhand High Court while dealing with the question of delay in depositing employee's contribution towards provident fund held that 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 reading of the same makes 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 of contributions made to the provident fund authority any time before filing of the return for the year in which the liability to pay accrued alongwith evidence to establish payment thereof.

25. In Nexus Computers Pvt. Ltd.'s case (supra), the Madras High Court while relying upon the decision of Hon'ble Supreme

Court in rejecting SLP by a speaking order against the judgment of Gauhati High Court in Vinay Cement Ltd.'s case (supra), observed that law declared by the Apex Court is binding under Article 141 of the Constitution.

26. In AIMIL Ltd.'s case (supra), the Delhi High Court while discussing the decisions of various High Courts and the Supreme Court, observed that if the employee's 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 under the Provident Fund Act as well as ESI Act. The court held that in so far as Income Tax Act, 1961 is concerned, the assessee can get benefit of deduction if the actual payment is made before filing the return as per the principle laid down by the Supreme Court in Vinay Cement's case (supra).

27. In Essae Teraoka Pvt. Ltd.'s case (supra), the Karnataka High Court held that 'contribution' used in clause (b) of Section 43B of the Act means the contribution of the employer and the employee and thus, if the contribution is made on or before the due date or furnishing the return of income under sub-section (1) of Section 139 of the Act, the employer is entitled for deduction.

28. In Merchem Ltd.'s case (supra), heavily relied upon by the

Revenue, the Kerala High Court while disagreeing with the view taken by the various High Courts and explaining the decision of the Hon'ble Supreme Court in Alom Extrusion's case (supra), held:

> "26. Therefore, in our view, when Sec.43B as it stood prior to the amendment and Sec.36(1)(va) Explanation 1 thereto r/w Sec.2(24)(x) are considered together, it is clear that they operate in different fields. So far as the employee's contribution received is concerned, it should have been paid on or before the due date prescribed under the relevant statutes. Then again the learned counsel contended that on a reading of Sec.43B(b), any sum "payable by the assessee as an employer" by way of contribution to any provident fund meant payment of both employees contribution and employer's contribution, by the employer and therefore the assessee was entitled to pay both contributions together on or before the filing of the return under Sec.139(1) of the Act. We are unable to accept the said contention advanced by the learned counsel. If such a contention is accepted, that would make Sec.36 (1)(va) and the Explanation thereto *otiose.* According to us, there was no indication in Sec.43B as it stood prior to the amendment and thereafter also to deface Sec.36(1)(va) and the Explanation thereto from the Income Tax Act. Thus, it means that both provisions are operative and the contributions have to be paid in accordance with the mandate contained under Sec.36(1)(va) and Explanation thereto and under Sec.43B, respectively."

29. In George Williamson (Assam) Ltd.'s case (supra), while considering the question of law raised regarding interpretation of clause (b) of Section 43B of the Act, read with second proviso to said section and clause (va) of sub-section (1) of Section 36 of the Act, the Gauhati High Court while relying upon its earlier decisions in the matter of "*CIT vs. Bharat Bamboo and Timber Suppliers"* (1996) 219 ITR 212 and "*CIT*

vs. Assam Tribune", (2002) 253 ITR 93, held that contributions towards provident fund etc. paid before the filing of the return by the assessee are entitled for deduction.

30. The Hon'ble Supreme Court in Vinay Cement's case (supra), while rejecting the Special Leave Petition preferred against the judgment of Gauhati High Court in George Williamson (Assam) Ltd. and other connected appeals, observed:

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

31. The decision of the Hon'ble Supreme Court in Vinay Cement's case (supra), upholding the decision of Gauhati High Court in George Williamson (Assam) Ltd.'s case (supra), as concluded by the Madras High Court in Nexus Computer Private Limited's case (supra) and the Delhi High Court in AIMIL Ltd.'s case (supra) and "*The commissioner of Income Tax-V vs. P.M. Electronics Ltd.",* (ITA No.475/07, decided on 3.11.08), is binding precedent under Article 141 of the Constitution of India, which is required to be followed by this court.

32. In view of the discussion above, the substantial question of law framed as aforesaid is answered in favour of the assessee and against the Revenue.

33. In the result, the appeals are allowed. The impugned order dated 19.12.07 passed by the Income Tax Appellate Tribunal, Jodhpur Bench, Jodhpur in Income Tax Appeal No.131/JDPR/2005 and 159/JDPR/2007 for the Assessment Year 2001-02 and 2002-03 respectively are set aside. No order as to costs.

(DEEPAK MAHESHWARI)J. (SANGEET LODHA)J.