<u>Judgment reserved on 17.08.2016</u>
<u>Judgment delivered on 21.12.2016</u>

<u>Court No. - 34</u>

Case :- INCOME TAX APPEAL No. - 87 of 2006
Appellant :- Sagun Foundry Private Limited
Respondent :- Commissioner of Income Tax, Kanpur
Counsel for Appellant :- R.P. Agarwal,R.R. Agrawal
Counsel for Respondent :- B.Agrawal, Piyush Agrawal

<u>Hon'ble Sudhir Agarwal,J.</u>
<u>Hon'ble Prabhat Chandra Tripathi,J.</u>

(Delivered by Hon'ble Sudhir Agarwal,J.)

1. Heard Sri R.R. Agrawal, learned Senior Advocate for appellant and Sri Piyush Agrawal, Advocate appearing on behalf of Revenue.

2. This is an Assessee's appeal under Section 260-A of Income Tax Act, 1961 (hereinafter referred to as 'Act 1961') arising from judgment and order dated 26.10.2005, passed by Income Tax Appellate Tribunal, Lucknow Bench (S.M.C.), Lucknow (hereinafter referred to as 'Tribunal') in Income Tax Appeal no. 304/LUC/2005 relating to Assessment Year (hereinafter referred to as 'A.Y.') 2001-02. Though it was admitted on six substantial questions of law mentioned in Court's order dated 29.05.2009 but learned counsel for appellant stated that he is pressing this appeal only in respect to questions 4, 5 and 6 and only the aforesaid three questions need be adjudicated.

3. Questions 4, 5 and 6 read as under:-

> *"(4) Whether on the facts and in the circumstances of the case, the second proviso to the Section 43-B of the Income Tax Act, 1962 does not override the first proviso to the said section and hence the deduction of Rs. 2,62,418/-* ***in respect of employer's contribution to*** *provident fund and ESI was admissible to the Assessee/appellant under the first proviso of Section 43-B itself?*

(5) Whether the omission of the second proviso to Section 43-B vide Finance Act, 2003 with effect from 01.04.2004, is curative in nature and has retrospective effect and the Assessee/appellant is eligible to claim ***deduction of Rs. 2,62,418/- being employer's contribution to provident fund*** *and ESI in the Assessment Year 2001-02 in view of such amendment?*

(6) Whether the provisions of Section 36 and Section 43-B are mutually exclusive and the Assessee/appellant is legally entitled to ***claim deduction of employees' contribution to provident fund and ESI amounting to Rs. 2,84,261/- under Section 43-B as amended vide Finance Act, 2003****, even if the said deduction was not admissible under Section 36(1) (va) of the Income Tax Act, 1962?"*

4. Brief facts, necessary for understanding the dispute are, that Assessee, a private limited company incorporated under Companies Act, 1956, is engaged in manufacture and sale of cast iron and also in job work, having its registered office at Kanpur. It deposited contribution of employer and employees towards Provident Fund and Employees State Insurance (hereinafter referred to as 'ESI'), beyond due date, prescribed under relevant labour welfare statutes. It is however admitted to both the parties that deposits were made in the same Financial Year and balance contribution were deposited well before due date of filing Income Tax Return under Section 139 (1) of Act 1961, for previous year. The details of deposits are given as under:-

P.F. Contributions (including interest)	Employees Contributions Rs.	Employers' Contribution Rs.
Amount deposited within the financial year	1,87,317	1,19,501
Amount deposited after FY but before the due date of filing the I.T. Return	90,231	57,249
Sub Total (A)	2,77,547	1,76,750
ESI Contributions: (including interest)		
Amount deposited within the financial year	21,464	58,246
Amount deposited after FY but before the due date of	10,108	27,429

filing the I.T. Return		
Sub Total (B)	31,572	85,675
Total (A+B)	3,09,119	2,62,418
Amount Disallowed	2,84,261	2,62,418

5. Appellant had not set up any fund for Provident Fund or ESI. Contributions have been forwarded to Provident Fund Authorities under the Employees Provident Fund and Miscellaneous Provisions Act, 1952 (hereinafter referred to as ‘Act 1952) and ESI Corporation set up under Employees State Insurance Act, 1948 (hereinafter referred to as ‘Act 1948’).

6. Appellant filed Income Tax Return showing loss of Rs. 2,50,800/-. Assessing Officer (hereinafter referred to as 'A.O.') completed assessment at an income of Rs. 3,22,188/- after disallowing deduction of Rs. 2,84,261/- towards employees’ contribution to Provident Fund and ESI and Rs. 2,62,418/- being employers’ contribution to Provident Fund and ESI. The former disallowance was made under Section 36(1) (va) and latter disallowance was made under Section 43B of Act 1961.

7. Against Assessment Order dated 30.01.2004, passed under Section 143(3) of Act 1961, appellant preferred appeal before Commissioner of Income Tax (Appeals) (hereinafter referred to as ‘CIT (A)’) who dismissed appeal vide order dated 21.02.2005. On these two aspects, appellants further appeal, preferred before Tribunal, has also been rejected.

8. Now in order to answer the aforesaid questions, we need to examine relevant statutory provisions and law of precedence wherein similar issues have been considered and decided.

9. Section 2(24) defines “Income” and clause (x) is in respect to the “employees contribution”. The relevant provision is quoted herein:-

“ 2(24) "income" includes—

(i) profits and gains;

(ii) dividend;

(iia) voluntary contributions received by a trust created

wholly or partly for charitable or religious purposes or by an institution established wholly or partly for such purposes or by an association or institution referred to in clause (21) or clause (23), or by a fund or trust or institution referred to in sub-clause (iv) or sub-clause (v) or by any university or other educational institution referred to in sub-clause (iiiad) or sub-clause (vi) or by any hospital or other institution referred to in sub-clause (iiiae) or sub-clause (via) of clause (23C) of section 10 or by an electoral trust.

Explanation.–For the purposes of this sub-clause, "trust" includes any other legal obligation ;

(iii) the value of any perquisite or profit in lieu of salary taxable under clauses (2) and (3) of section 17;

(iiia) any special allowance or benefit, other than perquisite included under sub-clause (iii), specifically granted to the assessee to meet expenses wholly, necessarily and exclusively for the performance of the duties of an office or employment of profit;

(iiib) any allowance granted to the assessee either to meet his personal expenses at the place where the duties of his office or employment of profit are ordinarily performed by him or at a place where he ordinarily resides or to compensate him for the increased cost of living;

(iv) the value of any benefit or perquisite, whether convertible into money or not, obtained from a company either by a director or by a person who has a substantial interest in the company, or by a relative of the director or such person, and any sum paid by any such company in respect of any obligation which, but for such payment, would have been payable by the director or other person aforesaid;

(iva) the value of any benefit or perquisite, whether convertible into money or not, obtained by any representative assessee mentioned in clause (iii) or clause (iv) of sub-section (1) of section 160 or by any person on whose behalf or for whose benefit any income is receivable by the representative

assessee (such person being hereafter in this sub-clause referred to as the "beneficiary") and any sum paid by the representative assessee in respect of any obligation which, but for such payment, would have been payable by the beneficiary;

(v) any sum chargeable to income-tax under clauses (ii) and (iii) of section 28 or section 41 or section 59;

(va) any sum chargeable to income-tax under clause (iiia) of section 28;

(vb) any sum chargeable to income-tax under clause (iiib) of section 28;

(vc) any sum chargeable to income-tax under clause (iiic) of section 28;

(vd) the value of any benefit or perquisite taxable under clause (iv) of section 28;

(ve) any sum chargeable to income-tax under clause (v) of section 28;

(vi) any capital gains chargeable under section 45;

(vii) the profits and gains of any business of insurance carried on by a mutual insurance company or by a co-operative society, computed in accordance with section 44 or any surplus taken to be such profits and gains by virtue of provisions contained in the First Schedule;

(viia) the profits and gains of any business of banking (including providing credit facilities) carried on by a co-operative society with its members;

(ix) any winnings from lotteries, crossword puzzles, races including horse races, card games and other games of any sort or from gambling or betting of any form or nature whatsoever.

Explanation.—For the purposes of this sub-clause,—

(i) "lottery" includes winnings from prizes awarded to any person by draw of lots or by chance or in any other manner whatsoever, under any scheme or arrangement by whatever name called;

(ii) "card game and other game of any sort" includes any game show, an entertainment programme on television or electronic mode, in which people compete to win prizes or any other similar game;

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

10. 'Income' is computed under Section 28 and it reads as under:-

***"28. Profits and gains of business or profession.-** The following income shall be chargeable to income-tax under the head "Profits and gains of business or profession",—*

(i) the profits and gains of any business or profession which was carried on by the assessee at any time during the previous year ;

(ii) any compensation or other payment due to or received by,—

(a) any person, by whatever name called, managing the whole or substantially the whole of the affairs of an Indian company, at or in connection with the termination of his management or the modification of the terms and conditions relating thereto;

(b) any person, by whatever name called, managing the whole or substantially the whole of the affairs in India of any other company, at or in connection with the termination of his office or the modification of the terms and conditions relating thereto ;

(c) any person, by whatever name called, holding an agency in India for any part of the activities relating to the business of any other person, at or in connection with the termination of the agency or the modification of the terms and conditions relating thereto ;

(d) any person, for or in connection with the vesting in the Government, or in any corporation owned or controlled by the Government, under any law for the time being in force, of the management of any property or business ;

(iii) income derived by a trade, professional or similar association from specific services performed for its members ;

(iiia) profits on sale of a licence granted under the Imports (Control) Order, 1955, made under the Imports and Exports (Control) Act, 1947 (18 of 1947) ;

(iiib) cash assistance (by whatever name called) received or receivable by any person against exports under any scheme of the Government of India ;

(iiic) any duty of customs or excise re-paid or re-payable as drawback to any person against exports under the Customs and Central Excise Duties Drawback Rules, 1971 ;

(iiid) any profit on the transfer of the Duty Entitlement Pass Book Scheme, being the Duty Remission Scheme under the export and import policy formulated and announced under section 5 of the Foreign Trade (Development and Regulation) Act, 1992 (22 of 1992);

(iiie) any profit on the transfer of the Duty Free Replenishment Certificate, being the Duty Remission Scheme under the export and import policy formulated and announced under section 5 of the Foreign Trade (Development and Regulation) Act, 1992 (22 of 1992) ;

(iv) the value of any benefit or perquisite, whether convertible into money or not, arising from business or the exercise of a profession;

(v) any interest, salary, bonus, commission or remuneration, by whatever name called, due to, or received by, a partner of a firm from such firm :

Provided that where any interest, salary, bonus, commission or remuneration, by whatever name called, or any part *thereof has not been allowed to be deducted under clause (b) of section 40, the income under this clause shall be adjusted to the extent of the amount not so allowed to be deducted ;*

(va) any sum, whether received or receivable, in cash or kind, under an agreement for—

(a) not carrying out any activity in relation to any business; or

(b) not sharing any know-how, patent, copyright, trade-mark, licence, franchise or any other business or commercial right of similar nature or information or technique likely to assist in the manufacture or processing of goods or provision for services:

Provided that sub-clause (a) shall not apply to—

(i) any sum, whether received or receivable, in cash or kind, on account of transfer of the right to manufacture, produce or process any article or thing or right to carry on any business, which is chargeable under the head "Capital gains";

(ii) any sum received as compensation, from the multilateral fund of the Montreal Protocol on Substances that Deplete the Ozone layer under the United Nations Environment Programme, in accordance with the terms of agreement entered into with the Government of India.

Explanation.—For the purposes of this clause,—

(i) "agreement" includes any arrangement or understanding or action in concert,—

(A) whether or not such arrangement, understanding or action is formal or in writing; or

(B) whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings;

(ii) "service" means service of any description which is made available to potential users and includes the provision of services in connection with business of any industrial or

commercial nature such as accounting, banking, communication, conveying of news or information, advertising, entertainment, amusement, education, financing, insurance, chit funds, real estate, construction, transport, storage, processing, supply of electrical or other energy, boarding and lodging;

(vi) any sum received under a Keyman insurance policy including the sum allocated by way of bonus on such policy.

Explanation.—For the purposes of this clause, the expression "Keyman insurance policy" shall have the meaning assigned to it in clause (10D) of section 10;

(vii) any sum, whether received or receivable, in cash or kind, on account of any capital asset (other than land or goodwill or financial instrument) being demolished, destroyed, discarded or transferred, if the whole of the expenditure on such capital asset has been allowed as a deduction under section 35AD.

Explanation 2.—Where speculative transactions carried on by an assessee are of such a nature as to constitute a business, the business (hereinafter referred to as "speculation business") shall be deemed to be distinct and separate from any other business."

11. Section 36(1)(va), permit deductions in respect to relevant fund of employees.

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

(va) any sum received by the assessee ***from any of his employees to which the provisions of sub-clause (x) of clause (24) of section 2 apply****, if such sum is credited by the assessee to the* ***employee's account*** *in the relevant fund of 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.*

12. Section 43B however permits deductions otherwise allowable under Act 1961 in case paid actually before the date of filing of Return under Section 139 and carves out an exception in this regard. Section 43B as it was available at the time of relevant A.Y. Is reproduced as under:-

> ***Section 43B: Notwithstanding anything contained in any other provision of this Act****, a deduction otherwise allowable under this Act in respect of—*
>
> *(a) any sum payable by the assessee by way of tax, duty, cess or fee, by whatever name called, under any law for the time being in force, or*
>
> *(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****, or*
>
> *(c) any sum referred to in clause (ii) of sub-section (1) of section 36, or*
>
> *(d) any sum payable by the assessee as interest on any loan or borrowing from any public financial institution or a State financial corporation or a State industrial investment corporation, in accordance with the terms and conditions of the agreement governing such loan or borrowing, or*
>
> *(e) any sum payable by the assessee as interest on any term loan from a scheduled bank in accordance with the terms and conditions of the agreement governing such loan,*
>
> ***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 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 the assessee along with such return.*
>
> ***Provided*** *further that no deduction shall, in respect of any sum referred to in clause (b), be allowed unless such sum has actually been paid in cash or by issue of a cheque or draft or by any other mode on or before the due date as defined in the Explanation below clause (va) of sub-section (1) of section 36, and where such payment has been made otherwise that in cash, the sum has been realised within fifteen days from the due date."*

13. Explanation 36(1)(va) provides that deduction shall be allowed in respect to the sum paid by Assessee to employees' account, in the relevant fund, on or before 'due date', i.e. such date by which Assessee (employer) is required to credit employees contribution in the relevant fund, under any Act, rule, order or notification issued therein. In the present case, 'due date' therefore, shall be the date mentioned in Act 1952 or Act 1948 or Rules framed thereunder etc. by which contributions were to be made. Admittedly, as per 'due date' under the relevant Acts, contributions were not paid by Assessee appellant. Section 36(1)(va) talks of only employee's contribution and allow deduction in respect thereto in computing 'income' under Section 28.

14. So far as Section 43B is concerned, we find that it was inserted w.e.f. 01.04.1984 to allow deductions provided payments are actually made before filing of return as per due date under Section

139(1) of Act 1961. 'Income' defined under Section 2(24) of Act, 1961, includes 'profits and gains'. Under Section 2(24)(x), any sum received by Assessee from his employees as contribution to any provident fund/superannuation fund or any fund set up under Employees State Insurance Act, 1948, or any other fund for welfare of such employees, constitute 'income'. In respect to such contributions deduction was allowed under Section 36(1)(va) when contributions received by employer is deposited within time prescribed, under relevant labour welfare statute. Prior to 01.04.1984, every Assessee (employer) was entitled to deduction on mercantile system of accounting as a business expenditure by making provision in his books of account in that regard and this situation continued upto 01.04.1984. An Assessee (employer), if maintaining books on accrual system of accounting, even after collecting contribution from his employee, and even without remitting the amount to Regional Provident Fund Commissioner, he i.e. Assessee (employer) would have claimed deduction as 'business expense', by merely making a provision to that effect in his books of account. A similar discrepancy was noticed in the context of sales tax where Assessee collected the same and other indirect taxes, from their respective customers, and claimed deduction only by making provisions in their books, without actually remitting the amount to Exchequer. To curb this practice, Section 43B was inserted w.e.f. 01.04.1984 whereby mercantile system of accounting with regard to tax, duty and contributions to welfare funds stood discontinued. Now it became necessary for Assessee (employer) to account for the aforestated items, not on mercantile basis, but on cash basis. W.e.f. 01.04.1988, Section 43B was again amended and a Proviso was inserted. It provided, inter alia, in the context of any sum payable by Assessee (employer) by way of tax, duty, cess or fee, if such an Assessee (employer) pays such tax, duty, cess or fee even after closing of accounting year but before date of filing of Return under

Section 139(1) of Act, 1961, assessee would be entitled to deduction under Section 43B on actual payment basis and such deduction would be admissible for the accounting year. This proviso, however, was not made applicable to contributions made by Assessee (Employer) to labour welfare funds. By Finance Act, 1988, w.e.f. 01.04.1988, Second Proviso came to be inserted. Second Proviso was further amended by Finance Act, 1989 w.e.f. 01.04.1989.

15. From the above provisions, now Assessee (employer) become entitled to deduction only if contribution stand credited on or before due date, given in Labour Welfare Statutes. However, Second Proviso again created certain difficulties. In many of the Companies, Financial Year ended on 31st March, did not coincide with accounting period of Labour Welfare Statutes. In many cases, time to make contribution of funds ended after due date of filing of Returns. On the representation of Industries, again Parliament, vide Finance Act, 2003, w.e.f. 01.04.2004, made amendment by deleting Second Proviso and amending First Proviso.

16. Learned counsel for Assessee argued that the issue in question is covered by Supreme Court judgment in **Commissioner of Income-Tax Vs Alom Extrusions Ltd., (2009) 319 ITR 306**, but both learned counsels appearing for rival parties admitted that even after the aforesaid judgment, various High Courts have taken divergent views on the question, whether Section 43B can be read alongwith Section 36(1)(va) or both have independent, distinct and separate field of operation. In this back drop, we find it appropriate, first, to examine judgments of various High Courts which have been rendered after considering Supreme Court judgment in **Commissioner of Income-Tax Vs Alom Extrusions Ltd. (supra)** and thereafter would examine the entire aspect in totality.

17. We find that with respect to employees contribution to Provident Fund, as to whether disallowable or not with reference to Section 36(1)(va) read with Section 43B, a similar question came up

for consideration before Gujrat High Court in **Commissioner of Income-Tax Vs Gujrat State Road Transport Corporation, (2014) 366 ITR 170**. Therein Assessee collected Rs. 51,06,02,712/- from its employees towards provident fund contribution but deposited Rs. 21,16,61,582/- with provident fund trust. Thus there was a short fall of Rs. 24,89,41,130/-. This amount of short fall was treated by Assessing Officer as income of Assessee vide Section 2(24)(x) read with Section 36(1)(va) of Act 1961. Assessing Officer also added Rs. 1,93,55,580/- being the amount of short fall towards employers contributory provident fund and disallowed the same under Section 43B of Act 1961. He also disallowed the said amount of Rs. 1,93,55,580/- from expenses claimed by Assessee for the A.Y. in question i.e. 2005-06 as per provisions under Section 43B. Dissatisfied with assessment order, Assessee preferred appeal before CIT(A) who vide order dated 25.06.2009 partly allowed the same and deleted disallowance of Rs. 24,89,41,130/- (short fall in employees contribution to provident fund) and Rs. 1,93,55,580/- (short fall in employers contribution to provident fund) observing that employees contribution/employers contribution was deposited before filing Return under Section 139(1) of Act 1961 for the relevant period. Revenue, in its turn, preferred appeal before Tribunal. Relying on judgment in **Commissioner of Income-Tax Vs Alom Extrusions Ltd. (supra)**, Tribunal dismissed appeal and confirmed order passed by CIT(A). That is how matter came before High Court in appeal. Court considered following question, posed in para 7.01, reads as under:-

> *"Short question which is posed for consideration of this court is with respect to the disallowance of the amount being the employees' contribution to the PF account/ESI contribution which admittedly which the concerned assessee did not deposit with the PF Department/ESI Department within due date under the PF Act and/or the ESI Act."*

18. Gujrat High Court referred to Section 2(24)(x) and found that

any sum received by Assessee (employer) from his employees as contributions to any provident fund or superannuation fund or any fund set up under Act, 1948, or any other fund for welfare of such employees, constitute income. However, Section 36 of Act 1961 provides for deduction in computing income referred to in Section 28. The relevant provision of Section 36 applicable to the case before Gujrat High Court was Section 36(1)(va) with which we are also concerned. It entitles an Assessee for deduction in computing income referred to in Section 28 with respect to any sum received by Assessee (employer) from his employee to which Section 2(24)(x) apply, if such sum is credited by Assessee to employees accounts in the relevant fund before due date i.e. date prescribed in the relevant statute applicable to the concerned fund. Court also noticed that Section 43B is in respect to certain deductions and applies only on actual payment. It held that amendment was made by deletion of Second Proviso of Section 43B only, but no corresponding amendment was made under Section 36(1)(va). It said:

> *"It is required to be noted that as such there is no amendment in Section 36(1)(va) and even the 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 the employer's contribution the second proviso to Section 43B which provided that even with respect to the employer's contribution (Section 43B(b)), the Assessee was required to credit the 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) has been deleted and/or amended."*

19. That is how Gujrat High Court held that Section 43B would not be attracted in a case where dispute relates to employees contribution only. Section 43B would be confined only to employers contribution. It further said:

> *"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 the 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."

20. Gujrat High Court distinguished judgment of **Commissioner of Income-Tax Vs Alom Extrusions Ltd. (supra)** on the ground that therein actual dispute relates to employers' contribution and whether amendment in Section 43B by Finance Act, 2003 would operate retrospective or not, Supreme Court had no occasion to consider deduction with reference to Section 36(1)(va). For the same reason Gujrat High Court dissented with the judgments of Rajasthan High Court in **Commissioner of Income-Tax Vs Udaipur Dugdh Utpadak Sahakari Sangh Ltd., (2014) 366 ITR 163,** Punjab & Haryana High Court in **Commissioner of Income-Tax Vs Hemla Embroidery Mills P. Ltd., (2014) 366 ITR 167,** Himachal Pradesh High Court in **Commissioner of Income-Tax Vs Nipso Ployfabriks Ltd., (2013) 350 ITR 327** and Karnataka High Court in **Commissioner of Income-Tax Vs Sabri Enterprises, (2008) 298 ITR 141**.

21. Karnataka High Court had an occasion to consider, whether it should dissent with the view taken in the earlier judgments and follow the view taken by Gujrat High Court in **Commissioner of Income-Tax Vs Gujrat State Road Transport Corporation (supra)** and this occasion came in **Essae Teraoka P. Ltd. Vs Deputy Commissioner of Income-Tax, (2014) 366 ITR 408**. Dispute relates to A.Y. 2008-09. Assessee filed Return on 26.09.2008. Return was processed under Section 143(1) and thereafter on scrutiny, notice under Section 143(2) was issued. Assessing Officer completed assessment by order dated 24.12.2010 under Section 143(3) disallowing Rs. 12,51,737/- under Section 36(1)(va) and also disallowing Rs. 1,04,621/- under Section 14A read with Rule 8D. In

appeal, CIT (A) reversed findings of Assessing Officer but on appeal preferred by Revenue, Tribunal restored Assessing Officer's order and that is how matter came to Karnataka High Court. The question up for consideration was, "whether Tribunal was justified in affirming finding of Assessing Officer and denying Assessee's claim of deduction of employees contribution to PF/ESI alleging that the payment was not made by appellant in accordance with the provisions of Section 36(1)(va) of Act 1961." The Assessee's counsel relied on earlier judgment of Karnataka High Court in **Commissioner of Income-Tax Vs Spectrum Consultants P. Ltd., (2014) 2 ITR-OL 622** while counsel for Revenue attempted to pursue to take a different view following decision of Gujrat High Court. The Division Bench judgment delivered by Hon'ble Dilip B. Bhosale, (as his lordship then was) held, if the contribution of employees fund is deposited within due date the Assessee is straightaway entitled for deduction under Section 36(1)(va). However Section 43B provides for certain deductions allowable only on actual payment. It gives an extension to the employer to make payment of contribution to provident fund or any other fund, till due date applicable for furnishing of Return under Section 139(1) of Act 1961, in respect of previous year in which liability to pay such sum was incurred, and evidence of such payment is furnished by Assessee along with such Return. Court then said:

> *"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 Income-Tax 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."*

(emphasis added)

22. It also said that the word “contribution” used in clause (b) of Section 43B of Act 1961 means the contribution of employer and employee, both, and that being so, if contribution is deposited on or before due date for furnishing Return of income under sub-section (1) of Section 139 of Act 1961, employer is entitled for deduction.

23. Though in a short judgment, but Punjab & Haryana High Court in **Commissioner of Income-Tax Vs Hemla Embroidery Mills (P.) Ltd., (supra)** not only followed **Commissioner of Income-Tax Vs Alom Extrusions Ltd. (supra)** but also its own earlier judgment in **Commissioner of Income-Tax Vs Rai Agro Industries Ltd., (2011) 334 ITR 122**, to hold that Section 43B shall apply to both 'contributions' i.e. employers' and employees'.

24. Kerala High Court in recent judgment in **Commissioner of Income-Tax Vs Merchem Ltd., (2015) 378 ITR 443**, has followed the decision of Gujrat High Court in **Commissioner of Income-Tax Vs Gujrat State Road Transport Corporation (supra)** and dissented with the otherwise judgments of Rajasthan High Court in **Commissioner of Income-Tax Vs State Bank of Bikaner and Jaipur, (2014) 363 ITR 70**, Karnataka High Court in **Commissioner of Income-Tax Vs Spectrum Consultants India P. Ltd. (supra)** and Bombay High Court in **Commissioner of Income-Tax Vs Ghatge Patil Transports Ltd., (2014) 368 ITR 749**.

25. Before following a particular view when there is divergence in views of different High Courts, we find it appropriate to examine Supreme Court judgment in **Commissioner of Income-Tax Vs Alom Extrusions Ltd. (supra)** to find out whether it can be confined only in respect to employers' contribution or is applicable to both 'contributions', whether by employer or employee.

26. The question, whether benefit under Section 43B, as a result of amendment of Finance Act, 2003, is retrospective or not, came to be considered in **Commissioner of Income-Tax Vs Alom Extrusions**

Ltd. (supra). Court considered the intent, purpose and object in the historical back drop of insertion of Section 43B and its progress by way of various amendments. Referring Section 2(24)(x) it said, income is defined under Section 2(24) which includes profits and gains. Further in clause (x) of Section 2(24) any sum received by Assessee from employees as 'contributions' to any provident fund/superannuation fund or any fund set up under Act 1948, or any other fund for welfare of such employees constitute 'income'. This is the reason why every Assessee/Employer was entitled to deduction even prior to April, 1, 1984, keeping books on mercantile system of accounting, as a business expenditure, by making provision in his books of account in that regard. Assessee was capable of keeping money with him and just by mentioning in accounts, was able to claim deduction as business expenses. Section 43B was inserted to check this practice and it resulted in discontinuing mercantile system of accounting with regard to tax, contributions etc. With induction of Section 43B an Assessee could claim deduction on actual payment basis. By Finance Act, 1988 Parliament inserted first proviso w.e.f. 01.04.1988 which inter alia provides that any sum payable by Assessee by way of tax, duty, cess or fee, if payment is made after closing of accounting year but before date of filing of Return under Section 139(1), Assessee would be entitled to deduction on actual payment basis. This proviso did not include within its ambit, contributions under labour welfare statutes. By Finance Act, 1988, Second Proviso thus Second proviso was further amended by Finance Act, 1989 w.e.f. 01.04.1989.

27. Court held that Assessee/employer thus would be entitled to deduction only if contribution stands credited on or before due date given in the Act 1952 or Act 1948. Second proviso created difficulties, inasmuch as under Act, 1981, due date was after the date of filing of returns and thus industries made representations to the Ministry of Finance. Court, looking to the history of amendments

held, it is evident that Section 43B, when enacted in 1984, commences with a non obstante clause. The underlying object being to disallow deductions claimed merely by making a book entry based on the mercantile system of accounting. At the same time, Section 43B made it mandatory for the Department to grant deduction in computing income under Section 28 in the year in which tax, duty, cess etc. is actually paid. Parliament took cognizance of the fact that accounting year of a company did not always tally with the due dates under Provident Fund Act, Municipal Corporation Act (Octroi) and other Tax laws. Therefore, by way of First Proviso, an incentive/relaxation was sought to be given in respect of tax, duty, cess or fee by explicitly stating that if such tax duty cess or fee is paid before the date of filing of the return under Act 1961, Assessee would than be entitled to deduction. This relaxation/incentive was restricted only to tax, duty, cess and fee. It did not apply to contributions to labour welfare funds. The reason appears to be that the employer should not sit on the collected contributions and deprive workmen of the rightful benefits under social welfare legislations by delaying payment of contributions to the welfare funds. But when implementation problems were pointed out for different due dates, uniformity was brought about in first proviso by Finance Act, 2003. Hence, amendment made by Finance Act 2003 in Section 43B is retrospective, being curative in nature and apply from 01.04.1988. In the result when contribution had been paid, prior to filing of return under Section 139(1), Assessee/employer would be entitled for deduction and since deletion of Second Proviso and amendment of First Proviso is curative and apply retrospectively w.e.f. 01.04.1988.

28. From the aforesaid judgment, we find that irrespective of the fact that deduction in respect of sum payable by employer contribution was involved, but Court did not restrict observations, findings and declaration of law to that context but looking to the

objective and purpose of insertion of Section 43B applied it to both the contributions. It also observed clearly that Section 43B is with a non-obstante clause and therefore over ride even if, anything otherwise is contained in Section 36 or any provision of Act 1961.

29. Therefore, we are clearly of the view that law laid down by High Courts of Karnataka, Rajasthan, Punjab & Haryana, Delhi, Bombay and Himachal Pradesh have rightly applied Section 43B in respect to both contributions i.e. employer and employee. Otherwise view taken by Gujrat High Court and followed by Kerala High Court, with great respect, we find expedient to dissent therewith.

30. In view of above all the questions formulated above are answered against Revenue and in favour of Assessee.

31. Appeal is therefore allowed. Judgment of Tribunal taking otherwise view is hereby set aside.

Order Date :- 21.12.2016
Pravin