

income of Rs.9,80,723/-. While completing the assessment under Section 143(3) of the Income Tax Act, 1961 ('the Act') vide its order dated 26.12.2008 the Assessing Officer (AO) noticed that the assessee had deposited payment of Rs.14,60,412/- in the PF fund and Rs.973/- in the ESI fund with delay that is the said payments were deposited after the due dates i.e. after 15th next month and, therefore, added the said amount to the income of the assessee as per the provisions of Section 36(1)(va) read with Section 2(24)(x) of the Act.

Aggrieved by the assessment order dated 26.12.2008, the assessee filed an appeal before the CIT(A), who, vide its appellate order dated 15.03.2010 after noticing certain judgments came to the conclusion that it is a settled position of law that where payments on account of contribution to the PF, ESI etc. are made within the due date of filing the return, such deductions are allowable. It was further noticed that it was not in dispute that the PF contribution and ESI was deposited by the appellant before the due date of filing the return and, consequently, the CIT(A) deleted the dis-allowance made by the AO and granted a relief of Rs.14,61,385/-.

The order dated 15.03.2010 passed by the CIT(A) was questioned by the Revenue before the ITAT and, the ITAT by its order dated 16.12.2011 upheld the order passed by the CIT(A) on the said issue, inter alia, holding that the employees' contribution is allowable, if the same is paid before the due date of return.

It was contended by learned counsel for the Revenue that the CIT(A) and ITAT fell in error in deleting the addition made under Section 36(1)(va) read with Section 2(24)(x) of the Act without considering the facts and legal aspect involved therein. It was submitted with reference to Section 43B of the Act that the deletion of second proviso therein, after the amendment by the Finance Act, 2003; the contribution of the employer is governed by provisions of Section 43B, whereas, employees' contribution continues to be governed by provision of Section 36(1)(va) read with Section 2(24)(x) of the Act and, therefore, the ITAT fell in error in upholding the order passed by the CIT(A).

The effect of deletion of second proviso to Section 43B of the Act was considered by Hon'ble Supreme Court in Commissioner of Income Tax v. Alom Extrusions Ltd. : (2009) 319 ITR 306 and it was observed at page 314 of the report as under:-

".....section 43B (main section), which stood inserted by the Finance Act, 1983, with effect from April 1, 1984, expressly 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 (main section) made it mandatory for the Department to grant deduction in computing the income under section 28 in the year in which tax, duty, cess, etc., is actually paid. However, Parliament took cognizance of the fact that the accounting year of a company did not always tally with the due dates under the Provident Fund Act, Municipal Corporation Act (octroi) and other tax laws. Therefore, by way of the 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 the Income-tax Act (due date), the assessee(s) then would be entitled to deduction. However, 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(s) should not sit on the collected contributions and deprive the workmen of the rightful benefits under social welfare legislations by delaying payment of contributions to the welfare funds. However, as stated above, the second proviso resulted in implementation problems, which have been mentioned hereinabove, and which resulted in the enactment of the Finance Act, 2003, deleting the second proviso and bringing about uniformity in the first proviso by equating tax, duty, cess, and fee with contributions to welfare funds."

Further the Hon'ble Supreme Court in CIT v. Vinay Cement Ltd. : (2009) 313 ITR (St.) 1 while dismissing the Special Leave Petition preferred by the Revenue against the judgment of the Guwahati High Court observed as under:-

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

Following the observations of Hon'ble Supreme Court in Vinay Cement (supra), the Delhi High Court in Commissioner of Income-Tax v. AIMIL Ltd : (2010) 321 ITR 508 (Delhi) held at page 518 as under:-

"We may only add that if the employees' 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 in the Provident Fund Act as well as the ESI Act. Therefore, the Act permits the employer to make the deposit with some delays, subject to the aforesaid consequences. In so far as the Income-tax Act is concerned, the assessee can get the benefit if the actual payment is made before the return is filed, as per the principle laid down by the Supreme Court in Vinay Cement (2009) 313 ITR (St.) 1."

In view of the settled legal position, the appeal preferred by the Revenue has no substance and the same is, therefore, dismissed. No costs.

(ARUN BHANSALI),J.

(NARENDRA KUMAR JAIN),J.

A.K. Chouhan
S/1