

**IN THE HIGH COURT OF JUDICATURE AT PATNA**

**Miscellaneous Appeal No.302 of 2008**

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M/S Bihar State Warehousing Corporation Ltd., B-II, First Floor, Maurya Lok  
Complex, Patna-800001, through Shri Umesh Chandra Sharma, Managing Director

.... Assessee/Appellant

Versus

1. Commissioner of Income Tax- 1, Patna

2. Dy. Commissioner of Income Tax, Circle-2, Patna

.... Assessing Officer/ Respondents

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**Appearance :**

For the Appellant : Mr. Ajay Kumar Rastogi

For the Respondents : Mrs. Archana Sinha

Mr. Alok Kumar

Mrs. Shalini Bihari

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**CORAM: HONOURABLE MR. JUSTICE HEMANT GUPTA**

**and**

**HONOURABLE MR. JUSTICE RAMESH KUMAR DATTA**

**CAV JUDGMENT**

**(Per: HONOURABLE MR. JUSTICE RAMESH KUMAR DATTA)**

**Date: 19-07-2016**

Heard learned counsel for the assessee-appellant and  
learned Senior Standing Counsel for the Income-tax Department.

The appeal has been filed by the assessee challenging the  
order dated 31.01.2008 passed, in I.T.A. No.176/PAT/2007, by the  
Income-tax Tribunal, Patna Bench, Patna, for the assessment year  
2003-04, by which the appeal of the assessee has been rejected.

The assessee is a Public Sector Undertaking of the  
Government of Bihar and is carrying on the business of warehousing.  
For the assessment year 2003-04, the appellant filed its return of  
income of Rs.28,35,710/-.

Initially, the return was processed under Section 143 (1)  
of the Income-tax Act, 1961 (in short “the Act”) and assessment was



made at the total income filed but subsequently notices under Sections 143 (2) and 142 (1) of the Income-tax Act were issued on 14.10.2004. Thereafter, fresh notice under Section 142 (1) of the Act was issued along with detailed questionnaires on 08.08.2005. The representative of the assessee appeared on 18.08.2005 and after repeated adjournments, finally on 27.01.2006 he produced the books of accounts and complete reply of the questionnaire and other details were submitted. The Assessing Officer after considering the fact that the contribution had been made after due date statutorily prescribed disallowed the payment of employer's contribution to EPF to the extent of Rs.8,32,507/- under Section 43B of the Income-tax Act and also disallowed the employees' contribution to Provident Fund amounting to Rs.8,32,507/- treating the same as income from other sources as per the provision of sub-section (2) of Section 24 read with Section 36 (1) (va) of the Act. Similarly, the provision of Rs.7,64,335/- towards gratuity was disallowed and the same was added to the total income in terms of the provisions of Section 40A (7) of the Act.

It may be pointed out that prior to such disallowance the assessee was specifically asked to explain why the said amount should not be allowed by notice under Section 142 (1) of the Act dated 08.08.2005 but the assessee failed to furnish any reply till the passing of the order. Other disallowance made by the assessing officer is not

relevant for the purpose of the present appeal.

Aggrieved by the aforesaid order dated 25.03.2006 of the Deputy Commissioner of Income-tax Circle-II, the assessing officer, the assessee filed an appeal before the Commissioner of Income-tax (Appeals)-II, Patna. The appeal was allowed so far as the delayed payment of employer's contribution to Employees Provident Fund to the extent of Rs.8,32,507/- was concerned under Section 43B of the Act and the said addition was ordered to be deleted.

So far as the delayed payment of Rs.8,32,507/- of the employees' contribution to E.P.F. is concerned, the addition of the same was confirmed holding that no relief is allowable on the ground of Section 43B of the Act as the omission of second proviso to the said Section with effect from 01.04.2004 does not apply to delayed payment of employees' contribution to any Provident Fund or any fund mentioned in sub-section (2) of Section 24 of the Act.

Similarly, accepting the reasoning of the Assessing Officer the addition of Rs.7,64,335/- towards provision for gratuity was also confirmed in terms of relevant provisions of Section 40A (7) of the Act.

On further appeal both by the Department and the Assessee, the appeal of the Department was dismissed as also that of the assessee. Aggrieved by the same, the present appeal has been filed by the assessee. The appeal was admitted on the following substantial

questions of law:-

(i) Whether on the facts and in the circumstances of the case the Tribunal is justified in upholding the addition of Rs.8,32,507/- made under Section 2 (24)(x) read with Section 36(1)(va) of the Income-tax Act?

(II) Whether on the facts and in the circumstances of the case the Tribunal is correct in holding that the provision for gratuity was not made towards approved gratuity fund and that the gratuity has not become payable during the financial year and that the provision has not been made on actuarial valuation basis?"

Learned counsel for the assessee submits that the Tribunal was not justified in not following its earlier order dated 20.12.2001 passed in the case of M/s. Sintra Ltd. vs. ACIT, Circle, 1 (3), Patna in I.T.A. No. 497/Pat/196 in which under similar circumstances, it was held that the treatment meted out to the employees' contribution by disallowing the same was also on the basis, i.e., the delay in credit to the appropriate authorities, which was condoned by the appropriate authorities and thus the contention of the Department was found to be without force and it was held that there was no reason to consider the amount as income from other sources of the assessee and the addition was deleted. It is submitted that the present matter is practically on the same footing as the employees'



contributions were paid within due date of filing of return and as a matter of fact some of the amounts of employees' contribution was deposited well within the financial year 1.4 2002 to 31.03.2003 itself. It is further submitted by learned counsel that there was no reason to treat/consider the said delayed payment in a different manner from the employer's contribution to the Provident Fund and both should have been dealt with under Section 43B of the Act and there was no justification for invoking sub-section (2) of Section 24 (x) read with Section 36 (1) (va) of the Act for disallowing the same.

In support of the aforesaid stand, learned counsel for the appellant relies upon a decision of the Supreme Court in the case of Commissioner of Income-tax vs. Alom Extrusions Ltd.: (2009) 319 ITR 306 (SC) = 2010 (1) SCC 489, following which the Bombay High Court in the case of Commissioner of Income-tax vs. Ghatge Patil Transports Ltd.: (2014) 368 ITR 749 (Bom) and Punjab and Haryana High Court in the case of Commissioner of Income Tax vs. Hemla Embroidery Mills (P) Ltd.: (2014) 366 ITR 167 (P & H) have held that both the employees' and employer's contributions are covered under the amendment to Section 43B of the Income Tax Act and the Alom Extrusions judgment of the Supreme Court and therefore the Tribunal was right in holding that the payments thereof were subject to benefits of Section 43B of the Act.

Learned counsel for the Income-tax Department, on the



other hand submits that the Tribunal has rightly made a distinction in the matter with regard to delay in payment of employees' contribution to the Provident Fund and delayed payment of employer's contribution to Provident Fund. It is submitted that the appeal of the Department has been rejected by the Tribunal making a distinction between the two provisions which appear to be justified. It is urged that only the payment of employer's contribution to Provident Fund is covered by the provision of Section 43B of the Act and employees' contribution is squarely covered by the provisions of Section 24 (2) (x) read with Section 36 (1) (va) of the Act. It is, thus, submitted that the Tribunal has rightly decided the present matter and was not obliged to follow a wrong decision earlier rendered in Ms. Sintra's case (supra).

In the case of Alom Extrusions Ltd. (supra), the Apex Court has dealt with the history of Section 43 B of the Act along with its proviso and referred to the fact that the amendments were made therein on account of difficulties felt in complying with the provisions of the said section vis-à-vis the period prescribed under the Employees Provident Fund Act. Earlier by way of the first proviso the benefit of deduction was restricted only to tax, duty, cess or fee paid after the closing of the accounting year but before the date of filing of the return of income under Section 139 (1) but not to labour welfare funds. The second proviso was then inserted to allow deduction of



contribution to, inter alia, any provident fund if made before the due date as per the Employees Provident Fund Act during the previous year. This again resulted in implementation problems as a result of which the second proviso was deleted and the first proviso was amended bringing about uniformity by equating tax, duty and fee with contribution to labour welfare funds. It was made clear that the benefit of deduction would be applicable, provided the payments are made before the due date for filing of the return.

From a perusal of the aforesaid decision, it is evident that it does not specifically refer to the employees' contribution or employer's contribution and both have been treated on the same footing. So far as difficulties in complying with the due date under the EPF Act vis-à-vis the previous year of the Income-tax is concerned, there can be no distinction between the payment of employees or employer's contribution and the same difficulties would be faced for both. In Alom Extrusions' case, the Court has broadly dealt with contribution to be made by the employers to the Labour Welfare Fund without making any distinction between employees and employer's contributions, as the deposits have to be made by the employer of both type of contributions.

The issue as to whether a distinction can be made between the employees' contribution and employer's contribution with regard to applicability of Section 43B of the Act was squarely

raised before the Bombay High Court in Ghatge Patil Transports case (supra) and before the Punjab and Haryana High Court in Hemla Embroidery Mills' case (supra) and both the High Courts have answered the same holding that both the employees' and employer's contributions are covered by the amendment of Section 43B of the Act after considering Alom Extrusions' case (supra).

Although technical reading of Section 43B and the provisions of sub-section (2) of Section 24 (x) read with Section 36 (1) (va) of the Act creates the impression that the employees' contribution would continue to be treated differently under a different head of deduction, as the head of deduction is separate under Section 43B and Section 36 of the Act but on a broader reading of the amendments made to Section 43B repeatedly and the intention of Parliament, there appears to be sufficient justification for taking the view that the employees' and the employer's contribution ought to be treated in the same manner. In Alom Extrusions' case (supra), as pointed out earlier, the Supreme Court has not made any distinction between the two as similar problem of implementation would arise in both the cases, although specific issue was not raised therein; but both the Bombay High Court and the Punjab and Haryana High Court in the above referred cases after considering Alom Extrusions' case (supra) have answered the question treating the two contributions on the same footing.

Thus, I am inclined to respectfully agree with the view taken by the Bombay High Court and the Punjab and Haryana High Court.

Coming to the second substantial question of law while admitting the appeal, the stand of learned counsel for the assessee was that the Tribunal has recorded a wrong finding that the provision for payment of gratuity has not been made towards approved gratuity fund and that gratuity has not become payable during the financial year corresponding to the assessment year under consideration and that the provision has not been made on actuarial valuation basis.

It is sought to be argued by learned counsel for the appellant that the provision on account of gratuity has been made towards approved gratuity fund/scheme issued by the Life Insurance Corporation of India known as Group Gratuity Scheme and that the gratuity being an ascertained liability is to be accounted for every year as per mercantile system of accounting and becomes payable as per the terms of employment either at the time of superannuation or otherwise. It is contended that the gratuity is a contractual obligation of the appellant as an employer and the liability to make payment arises soon after the employment comes to an end. It is further submitted that the provision has been made on actuarial valuation as per the scheme of LIC and the Tribunal is not correct in holding that the decision of the Karnataka High Court in the case of Motor



Industries Co. Ltd.vs. Commissioner of Income-tax : (2007) 291 ITR 269 (Karn) is not applicable to the facts of the case, whereas the issues were identical in both the matters and the appellant in that case has also claimed premium paid/payable to LIC under the Group Gratuity LIC Fund.

Learned counsel for the Revenue, on the other hand, submits that the Tribunal has rightly relied upon the decision of the Apex Court in the case of Shree Sajjan Mills Ltd. vs. Commissioner of Income Tax and Another: (1985) 156 ITR 585 (SC) disallowing the provision for gratuity made by the appellant. It is submitted that a categorical finding has been recorded by the Tribunal that it is not the case of the assessee that the assessee has made provision for payment by way of any contribution towards approved gratuity fund or on the basis of any provision for gratuity that has become payable during the financial year under consideration. Thus, according to learned counsel, the provision as contained in Section 40A (7) of the Act would clearly apply in the present matter and the Tribunal as also the previous authorities have correctly decided the issue concurrently against the assessee.

Section 40A (7) (a) & (b) of the Act is in the following terms:-

“40A (7) (a) No deduction shall be allowed in respect of any provision (whether called as such or by any other

name) made by the assessee for the payment of gratuity to his employees on their retirement or on termination of their employment, for any reason.

(b) Nothing in clause (a) shall apply in relation to any provision made by the assessee for the purpose of payment of a sum by way of any contribution towards an approved gratuity fund, or for the purpose of payment of any gratuity, that has become payable during the previous year.”

It is evident from a reading of the said sub-section that while clause (a) prohibits allowing of any deduction in respect of any provision for the payment of gratuity to the employees of the assessee, clause (b), which has overriding effect over clause (a), provides for two exceptions to the said prohibition. The first is if the provision has been made for the purpose of payment of a sum as a contribution towards approved gratuity fund; and the second exception is if the provision is for the purpose of payment of any gratuity that has become payable during the previous year.

Apart from these two exceptions, any provision for gratuity has to be read in terms of sub-section (2) of Section 40A of the Act. In the assessment order itself, it has been recorded by the Assessing Officer that the assessee was specifically asked to explain why the amount of Rs.7,64,335/- on account of provision for gratuity

should not be disallowed by a notice dated 08.08.2005 under Section 142 (1) of the Act but the assessee failed to file any reply till the date of passing of the assessment order. In the absence of such a reply, it is not open to the assessee to claim that the provision had been made towards an approved gratuity fund itself.

Before the CIT (Appeals) the stand of the appellant was that the provision for gratuity being an ascertained liability and not a contingent liability is to be allowed for every year and that has been made towards an approved gratuity fund or they were sums which had become payable during the previous year concerned. The Tribunal has clearly recorded that it is not the case of the assessee that it has made the provision for the purpose of payment of gratuity by way of any contribution towards approved gratuity fund or for the purpose of any gratuity that has become payable during the financial year under consideration.

In view of the aforesaid factual position, no benefit can be derived by the assessee from the decision of the Karnataka High Court in the case of Motor Industry Co. Ltd. (supra) as the said case admittedly related to an approved gratuity fund and the Tribunal has thus rightly relied upon the decision of the Supreme court in Shree Sajjan Mill's case (supra).

It is, thus, evident that only before this Court for the first time the plea has been taken by the assessee that the provision has



been made for the purpose of payment to an approved gratuity fund, i.e., the LIC Group Gratuity Scheme. It is apparent that the appellant is now trying to raise, at a belated stage, a pure question of fact which has not been raised by it before any of the three lower authorities. I am afraid that such a pure question of fact cannot be permitted to be raised by the assessee at this belated stage. Along with the memorandum of appeal the assessee has brought on record two letters dated 27.08.2002 and 31.03.2003 of the Life Insurance of India which merely refers to LIC Group Gratuity Scheme for the employees of the assessee and the amounts that would become payable, if the assessee subscribes to the said scheme. The date of the second letter is 31.03.2003, i.e., last date of the previous year of the assessment year in question and till that date it does not appear that there was any concluded contract between the assessee and the LIC for subscribing to the said scheme nor anything has been brought on the record to show that the contribution had been made for the previous year relevant to the assessment year in question.

In the said circumstances, I am of the view that it is not open to learned counsel for the appellant to even raise and argue such a question in view of the clear provisions of Section 40A (7) of the Act. The appellant was certainly not entitled to deduction of the said provision made for gratuity and I see no reason to interfere with the finding that has been recorded concurrently by all the three

authorities.

Thus, in the light of the aforesaid discussions, the first substantial question of law is decided in the negative, in favour of the assessee and against the revenue.

So far as the second substantial question of law is concerned, in view of the factual position narrated above, it has to be reframed as follows:

“Whether on the facts and in the circumstances of the case, the Tribunal was correct in holding that the assessee was not entitled to deduction of gratuity of Rs.7,64,735/- in view of Section 40A of the Income-tax Act, 1961?”

The said question is answered in the affirmative against the assessee and in favour of the revenue.

The appeal is, accordingly, partly allowed.

**(Ramesh Kumar Datta, J)**

I agree  
**(Hemant Gupta, J)**

**(Hemant Gupta, J)**

V.P.Sinha/-

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