Commissioner of Income Tax Vs State Bank of Bikaner and Jaipur

Court: Rajasthan High Court (Jaipur Bench)

Date of Decision: Jan. 6, 2014

Acts Referred: Income Tax Act, 1961 â€" Section 139, 139(1), 143(3), 154, 2

Citation: (2014) 265 CTR 471 : (2014) 363 ITR 70

Hon'ble Judges: J.K. Ranka, J; Ajay Rastogi, J

Bench: Division Bench

Advocate: R.B. Mathur and Akhilesh Simlote, Advocate for the Appellant; P.K. Kasliwal and Gunjan Pathak, Advocate for the Respondent

Judgement

Jainendra Kumar Ranka, J.
These income tax appeals under s. 260A of the IT Act, 1961 (for short, "IT Act") are directed against the

order of the income tax Appellate Tribunal, Jaipur (for short, "Tribunal") in ITA No. 359/Jp/2006, ITA No. 358/Jp/2006 and ITA No.

825/Jp/2008 dt. 30th April, 2010, 30th April, 2010 and 24th Aug, 2009 respectively for the asst. yrs. 2002-03, 2001-02 and 2002-03

respectively. Since the controversy involved is identical, these income tax appeals are being decided by this common order.

2. The appeals were admitted on the following substantial question of law:

Substantial question of law in the case of State Bank of Bikaner & Jaipur (IT Appeal Nos. 177 of 2011 and 272 of 2011)

Whether on the facts and in the circumstances of the case, the Tribunal was justified in deleting the addition made on account of depositing the PF

payment beyond prescribed time, despite the fact that as per s. 36(1)(va) employee"s contribution should have been deposited in time and s. 43B

permits delayed payment as regards employer"s contribution and not the employee"s contribution?

Substantial question of law in the case of JVVNL (IT Appeal No. 189 of 2011)

Whether in the facts and circumstances of the case, the Tribunal was justified in law in deleting addition made by the AO on account of delay in

deposit of employees" contribution to PF under s. 36?

3. The brief facts, as emerging on the face of record, are that the respondent-assessees are being assessed to income tax from year to year and the

assessment stood completed originally under s. 143(3) of the IT Act in the case of SBBJ and notice under s. 154 was issued, as the AO felt that

there is a mistake apparent on the face of record.

4. In the case of the respondent-assessee--JVVNL assessment was completed under s. 143(3) of the IT Act and thereafter the respondent

proceeded before the appellate authorities.

5. The issue in short is that it came to the notice of the AO that the respondent-assessees, though made payment of provident fund account (PF)

and/or EPF, CPF, GPF but it was deposited beyond the prescribed time-limit under those Acts and accordingly the AO disallowed the same.

However, it may be observed that insofar as the case of the respondent-assessee--SBBJ is concerned, even the AO has not chosen to mention

under which provision of law the claim has been disallowed on account of the above facts, however, the CIT(A) as well as the Tribunal have

clarified that the amount was disallowed under the provisions contained under s. 43B.

5.1 Insofar as the case of the respondent-assessee--JVVNL is concerned, the AO has certainly observed that the amount is being disallowed

under the provisions of s. 43B of the IT Act.

6. It was contended by the respondent-assessee--SBBJ before the AO that the payment was made before the due date of filing of the return of

income and accordingly as per provisions of s. 43B of the IT Act, the claim was allowable. It was submitted that there is no mistake apparent on

the face of record and alternatively the issue, being debatable, will not come within the purview of s. 154 of the IT Act. However, the AO did not

agree with the contention raised by the respondent-assessee and disallowed the amount as according to him, the payments were made beyond the

due date as prescribed under the relevant Act of PF etc. and once the payment was made beyond the prescribed time, then the amount had to be

disallowed.

6.1 In the matter of respondent-assessee--JVVNL as well, it was submitted that there is an amendment under s. 43B of the IT Act which came

into effect from 1st April, 2004 and there was a submission of the respondent-assessee that it is retrospective in nature and therefore, is applicable

in the facts of the present case. The AO was not satisfied with the explanation offered by the respondent-assessee and disallowed the claim by

observing that the law has to be strictly followed and at least the assessee ought to have paid the amount according to the due date under the

relevant provisions of PF Act or GPF etc. and since there was violation of even those Acts, therefore, the benefit/deduction cannot be

granted/allowed. Accordingly, the amounts were disallowed.

7. Dissatisfied with the said disallowance, as aforesaid, the matter was carried in appeal before the CIT(A). Before the CIT(A), same explanation

was offered and it was further submitted that the payment under the PF Act could not be disallowed under s. 43B of the IT Act even as per the

provision as it stood prior to the amendment w.e.f. 1st April, 2004. Reliance was placed by the respondent-assessees on the judgment of the

Hon"ble apex Court in the case of Commr. of Income Tax-II, Gauhati Vs. Vinay Cement Ltd. and after considering the said judgment, the CIT(A)

agreed with the contention offered by the respondent-assessees and deleted the disallowance as made by the AO.

8. Dissatisfied with the deletion of the disallowance under s. 43B of the IT Act, the matter was carried in appeal before the Tribunal by the

Revenue. It was submitted on behalf of the Revenue that the AO had correctly disallowed the amount as per the provisions of s. 43B of the IT Act

and strict compliance is required to be made in the given facts, then certainly when the amount was paid beyond the due date, then there was no

occasion for the CIT(A) to come to a different conclusion. On behalf of the respondent-assessees, reliance was placed not only on the judgment of

the Hon"ble apex Court [Vinay Cement (supra)] but also a direct authority of Karnataka High Court rendered in the case of Commissioner of

Income Tax Vs. Sabari Enterprises, . Accordingly, after considering the submissions, the Tribunal dismissed the appeals preferred by the Revenue.

It is these orders of the Tribunal which have been assailed before us.

9. Shri R.B. Mathur, learned counsel for the Revenue drew attention of this Court towards provisions of s. 36(1)(va) coupled with s. 43B of the IT

Act and submitted that there was no justification for allowing the claim by the Tribunal as well as CIT(A) as under s. 36(1)(va) of the IT Act; the

amount was to be allowed only if the amount was paid on or before the due date and therefore, he contended that s. 43B of the IT Act would

come at a later stage and the first point, which is required to be looked into, is that under s. 36(1)(va) of the IT Act, if the amount has been paid on

or before the due date under the relevant Act, then certainly the deduction could have been allowed. He further submitted that as per Explanation,

as given under s. 36(1)(va) of the IT Act, the "due date" means the date by which the assessee is required, as an employer to credit the

employees" contribution to the concerned Department within due date prescribed under that Act and once it has been found as a finding of fact

that the amount was not deposited on or before the due date even the very deduction under s. 36 was not permissible and secondly, he submitted

that under s. 43B also, the amount could have been allowed if the same would have been paid on or before the due date as contemplated under

the relevant PF or GPF or CPF Act. He further submitted that the intention of the legislature was very clear that the amount was allowable only in

cases where the amount was paid before the due date and it was for the welfare of the employees as earlier several instances came where though

the amount was not paid but was claimed and therefore, this provision was brought in. Accordingly, he submitted that both the authorities have

come to a wrong conclusion which is not permissible under the Act.

10. Per contra, Shri P.K. Kasliwal and Mr. Gunjan Pathak, learned counsel for the respondent-assessees submitted that the Tribunal, after

considering all the facts, has come to the correct conclusion in analyzing the provisions contained under the Act.

11. It was further contented by them that though proviso was applicable from 1st April, 2004 but it was clarified that it has to be treated as

retrospective in nature. Nevertheless, they submitted that even the Hon''ble apex Court in the case of Vinay Cement Ltd. (supra) has come to the

conclusion that even the plain language of s. 43B of the Act makes it clear that even without the proviso the claim was allowable under the

provisions of s. 43B of the Act and accordingly submitted that the Tribunal has come to the correct conclusion and the appeal deserves to be

dismissed.

12. We have heard learned counsel for the parties. It would be fruitful to quote ss. 2(24)(x), 36(1)(va) and 43B of the IT Act which are required

to be considered in the present appeals:

Sec. 2(24) "income'' includes--

(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.

Sec. 36(1)(va) any sum received by the assessee from any of his employees to which the provisions of sub-cl. (x) of cl. (24) of s. 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.

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.

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

(a)....., 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,

(c) to (f).....

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 s. 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-s. (1) of s. 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.

Explanation 1.--For the removal of doubts, it is hereby declared that where a deduction in respect of any sum referred to in cl. (a) or cl. (b) of this

section is allowed in computing the income referred to in s. 28 of the previous year (being a previous year relevant to the assessment year

commencing on the 1st day of April, 1983 or any earlier assessment year) in which the liability to pay such sum was incurred by the assessee, the

assessee shall not be entitled to any deduction under this section in respect of such sum in computing the income of the previous year in which the

sum is actually paid by him.

13. On perusal of the above, it transpires that s. 36(1)(va) was inserted by Finance Act, 1987 w.e.f. 1st April, 1988 and Explanation to this

clause, if read collectively, explains to mean that the date by which the assessee is required as an employer to credit the contribution to the

employee"s account in the relevant fund under any Act/rule or order or notification issued thereunder or under any standing order, award, contract

of service or otherwise, prior to the above, clause was inserted to s. 36 for statutory deductions of payment of tax under the provisions of the Act.

Sec. 43B(b) was inserted by the Finance Act, 1983 which came into force w.e.f. 1st April, 1984. There again, provisions of s. 43B clearly

postulate that it is notwithstanding anything contained in other provision of the Act including s. 36(1)(va) and even prior to insertion of the clause,

assessee is entitled to get statutory benefit of deduction of payment of amount from the Revenue. It may be observed that the Hon"ble apex Court,

in the case of ALLIED MOTORS (P) LTD. ETC. Vs. COMMISSIONER OF INCOME TAX., , considered the scheme of s. 43B and the

scope of the said provision and observed thus as under:

Several cases have come to notice where taxpayers do not discharge their statutory liability such as in respect of excise duty, employer"s

contribution to PF, ESI Scheme, etc. for long periods of time, extending sometimes to several years. For the purpose of their income tax

assessments, they claim the liability as deduction on the ground that they maintain accounts on mercantile or accrual basis. On the other hand, they

dispute the liability and do not discharge the same. For some reason or the other, undisputed liabilities also are not paid. To curb this practice, it is

proposed to provide that deduction for any sum payable by the assessee by way of tax or duty under any law for the time being in force

(irrespective of whether such tax or duty is disputed or not) or any sum payable by the assessee as an employer by way of contribution to any PF,

or superannuation fund or gratuity fund or any other fund for the welfare of employees shall be allowed only in computing the income of that

previous year in which such sum is actually paid by him.

Sec. 43B was, therefore, clearly aimed at curbing the activities of those taxpayers, who did not discharge their statutory liability of payment of

excise duty, employer''s contribution to PF, etc., for long periods of time but claimed deductions in that regard from their income on the ground

that the liability to pay these amounts had been incurred by them in the relevant previous year. It was to stop this mischief that s. 43B was inserted.

It was clearly not realised that the language in which s. 43B was worded, would cause hardship to those taxpayers who had paid sales-tax within

the statutory period prescribed for this payment, although the payment so made by them did not fall in the relevant previous year. This was because

the sales-tax collected pertained to the last quarter of the relevant accounting year. It could be paid, only in the next quarter which fell in the next

accounting year. Therefore, even when the sales-tax had in fact been paid by the assessee within the statutory-period prescribed for its payment

and prior to the filing of the IT return, these assessees were unwittingly prevented from claiming a legitimate deduction in respect of the tax paid by

them. This was not intended by s. 43B. Hence, the first proviso was inserted in s. 43B. The amendment which was made by the Finance Act of

1987 in s. 43B by inserting, inter alia, the first proviso, was remedial in nature, designed to eliminate unintended consequences which may cause

undue hardship to the assessee and which made the provision unworkable or unjust in a specific situation.

14. The Hon''ble apex Court in the case of Vinay Cement Ltd. (supra), after approving the judgment rendered by Gauhati High Court in the case

of Commissioner of Income Tax Vs. George Williamson (Assam) Ltd., , came to the conclusion that such omission under s. 43B(b), without any

saving clause of the General Clauses Act, means that the above provisions namely, cl. (a) or (c) or (d) or (e) or (f) were not in existence or never

existed and after considering the judgments rendered by the Hon''ble apex Court in the cases of Kolhapur Canesugar Works Ltd. and Another Vs.

Union of India and Others, and Rayala Corporation (P) Ltd. and M.R. Pratap Vs. Director of Enforcement, New Delhi, , held the claim of the

assessee as allowable. The Hon''ble apex Court, as aforesaid, approving the judgment of Gauhati High Court, has held as under:

In the present case we are concerned with the law as it stood prior to the amendment of s. 43B. In the circumstances the assessee was entitled to

claim the benefit in s. 43B for that period particularly in view of the fact that he has contributed to provident fund before filing of the return.

15. The Hon''ble apex Court, in the case of Commissioner of Income Tax Kolkata-III Vs. Alom Extrusions Limited, , while considering the scope

of the amendment made w.e.f. 1st April, 2004, observed that the same is curative in nature, hence it is retrospective in nature and would operate

w.e.f. 1st April, 1988 (when the first proviso came to be inserted) and after discussing this, held as under:

Before concluding, we extract hereinbelow the relevant observations of this Court in the case of Commissioner of Income Tax, Bangalore Vs. J.H.

Gotla, Yadagiri, , which reads as under:

We should find out the intention from the language used by the legislature and if strict literal construction leads to an absurd result, i.e., a result not

intended to be subserved by the object of the legislation found in the manner indicated before, then if another construction is possible apart from

strict literal construction, then that construction should be preferred to the strict literal construction. Though equity and taxation are often strangers,

attempts should be made that these do not remain always so and if a construction results in equity rather than injustice, then such construction

should be preferred to the literal construction.

For the aforestated reasons, we hold that Finance Act, 2003, to the extent indicated above, is curative in nature, hence, it is retrospective and it

would operate w.e.f. 1st April, 1988 (when the first proviso came to be inserted). For the above reasons, we find no merit in this batch of civil

appeals filed by the Department which are hereby dismissed with no order as to costs.

16. Similarly, the Gauhati High Court, in the case of Commissioner of Income Tax Vs. Assam Tribune, , came to the similar conclusion that the

contribution towards the PF etc. having been deposited before filing of the return by the assessee, deduction could not be disallowed under s. 43B

of the Act.

17. The Delhi High Court in the case of Commissioner of Income Tax Vs. Dharmendra Sharma, , Madras High Court in the case of Commissioner

of Income Tax Vs. Nexus Computer (P) Ltd., , Delhi High Court in the case of The Commissioner of Income Tax-V Vs. P.M. Electronics Ltd., ,

Karnataka High Court in the case of 969846--> , Himachal Pradesh High Court in the case of Commissioner of Income Tax Vs. Nipso

Polyfabriks Ltd., also came to the aforesaid view.

18. Uttarakhand High Court in the case of The Commissioner of Income Tax Vs. M/s. Kichha Sugar Company Ltd., , after considering the

aforesaid provisions, held as under:

Therefore, the due date referred to in s. 36(1)(va) of the Act must be read in conjunction with s. 43B(b) of the Act and a reading of the same

would make it amply clear that the due date as mentioned in s. 36(1)(va), is the due date as mentioned in s. 43B(b) i.e., payment/contribution

made to the provident fund authority any time before filing the return for the year in which the liability to pay accrued along with evidence to

establish payment thereof. The AO proceeded on the basis that ''due date'', as mentioned in s. 36(1)(va) of the Act, is the due date fixed by the

provident fund authority, whereas in the matter of culling out the meaning of the word ''due date'', as mentioned in the said section, the AO was

required to take note of s. 43B(b) of the Act and by not taking note of the provisions contained therein committed gross error, which having been

rectified by the appellate authority and confirmed by the Tribunal, there is no scope of interference.

19. On perusal of s. 36(1)(va) and s. 43B(b) and analyzing the judgments rendered, in our view as well, it is clear that the legislature brought in the

statute s. 43B(b) to curb the activities of such taxpayers who did not discharge their statutory liability of payment of dues, as aforesaid, and rightly

so as on the one hand claim was being made under s. 36 for allowing the deduction of GPF, CPF, ESI etc. as per the system followed by the

assessees in claiming the deduction i.e. accrual basis and the same was being allowed, as the liability did exist but the said amount though claimed

as a deduction was not being deposited even after lapse of several years. Therefore, to put a check on the said claims/deductions having been

made, the said provision was brought in to curb the said activities and which was approved by the Hon''ble apex Court in the case of Allied

Motors (P.) Ltd. (supra).

20. A conjoint reading of the proviso to s. 43B which was inserted by the Finance Act, 1987 made effective from 1st April, 1988, the words

numbered as cls. (a), (c), (d), (e) and (f), are omitted from the above proviso and, furthermore second proviso was removed by Finance Act,

2003 therefore, the deduction towards the employer''s contribution, if paid, prior to due date of filing of return can be claimed by the assessee. In

our view, the Explanation appended to s. 36 of the Act further envisages that the amount actually paid by the assessee on or before the due date

admissible at the time of submitting return of the income under s. 139 of the Act in respect of the previous year can be claimed by the assessee for

deduction out of their gross total income. It is also clear that s. 43B starts with a notwithstanding clause and would thus override s. 36(1)(va) and if

read in isolation s. 43B would become obsolete. Accordingly, contention of counsel for the Revenue is not tenable for the reason aforesaid that

deductions out of the gross income for payment of tax at the time of submission of return under s. 139 is permissible only if the statutory liability of

payment of PF or other contributions referred to in cl. (b) are paid within the due date under the respective enactments by the assessees and not

under the due date of filing of return.

21. We have already observed that till this provision was brought in as the due amounts on one pretext or the other were not being deposited by

the assessees though substantial benefits had been obtained by them in the shape of the amount having been claimed as a deduction but the said

amounts were not deposited. It is pertinent to note that the respective Acts such as PF etc. also provides that the amounts can be paid later on

subject to payment of interest and other consequences and to get benefit under the IT Act, an assessee ought to have actually deposited the entire

amount as also to adduce evidence regarding such deposit on or before the return of income under sub-s. (1) of s. 139 of the IT Act.

22. Thus, we are of the view that where the PF and/or EPF, CPF, GPF etc., if paid after the due date under respective Acts but before filing of

the return of income under s. 139(1), cannot be disallowed under s. 43B or under s. 36(1)(va) of the IT Act.

23. Accordingly, the substantial question of law is answered against the appellant-Revenue and in favour of the assessee. Consequently, these

appeals, being devoid of merit, are hereby dismissed. No order as to costs.