

(2002) 12 MAD CK 0186

Madras High Court

Case No: Tax Case No. 218 of 1999 Reference No. 214 of 1999 31 December 2002

Commissioner of Income Tax

APPELLANT

Vs

Madras Radiators and Pressings
Ltd.

RESPONDENT

Date of Decision: Dec. 31, 2002

Citation: (2003) 129 TAXMAN 709

Hon'ble Judges: N.V. Balasubramanian, J; K. Raviraja Pandian, J

Bench: Full Bench

Advocate: Mrs. Pushya Sitharaman, for the Revenue, for the Appellant;

Judgement

@JUDGMENTTAG-ORDER

K. Raviraja Pandian, J.

At the instance of the revenue, the Income Tax Appellate Tribunal stated the case and referred the following questions of law for the opinion of this court :

"1. Whether on the facts and in the circumstances of the case, the Tribunal was right in law in holding that there was certain amount of ambiguity over the expression "15 days from the close of the month" as defined in section 38 of the Employees' Provident Fund Scheme, 1952, vis-a-vis month in which salary becomes due to the employees and the salary is paid to the employee ?

2. Whether the Tribunal was right in law in reckoning the date of payment of salary (vii) 7th of the succeeding month as the date from which the due date of payment to the Government of ESI and EPF dues and the delay thereon is to be considered ?

3. Whether the Tribunal was right in law in holding that section 36(1)(va) yields to section 43B when the second proviso to section 43B is to be reckoned as defined in Explanation to clause (va) of sub-section (1) of section 36 ?"

2. The assessment year is 1991-92. The assessee is a Company. It used to pay salary for the previous month on 7th of the succeeding month. While framing the assessment, it was found that there was delay in remitting the monthly contribution towards provident fund in respect of the employees of the assessee-company. The assessing officer was of the view that u/s 36(1)(va) of Income Tax Act, any sum collected by the assessee from their employees have to be credited to the fund on or before the due date and inasmuch as the employees contribution towards provident fund in a sum of Rs. 2,92,044 has been paid by the assessee after the due date, the assessee was not entitled to the exemption claimed and added the sum in the total income by applying the provisions of section 36(1)(va) of the Income Tax Act. On appeal before the Commissioner, the representative of the assessee admitted that the payment has been made beyond the grace period and on such admission, the Commissioner upheld the disallowance of provident fund contribution in a sum of Rs. 2,92,094. However, on further appeal to the Tribunal, the Tribunal found that under paragraph No. 38 of the Employees' Provident Fund Scheme, 1952, the contribution towards provident fund has to be made within fifteen days of close of every month. The expression "month" has not been defined. Section 36(1)(va) yields to section 43B of the Income Tax Act. As per section 43B, the deduction is to be regulated only on the basis of actual payment in the previous year in which it is so paid. The first and second provisos to section 43B were added by Finance Act, 1987 with effect from 1-4-1988. The first Proviso reduced the rigour of the main provision by enabling the assessee to get the benefit of deduction in respect of the duties, taxes, etc., even if they were paid after the end of the previous year but before the due date for furnishing the return u/s 139(1) of the Income Tax Act. The second proviso provides that unless the payment in respect of contributions to Provident Fund have been actually made during the previous year on or before the due date as prescribed under the relevant Act or the Rules, no deduction shall be allowed in respect of the same. In view of the omission in the second proviso as to the expression "during the previous year", the Tribunal was of the view that so long as the payments were made within the previous year, the payments are to be allowed as deduction under the main section.

3. We heard the arguments of Mrs. Pushya Sitharaman, learned senior standing counsel appearing for the revenue and perused the materials on record. The assessee in spite of due notice has not represented.

4. In our considered opinion, we are of the view that the Tribunal is not correct in coming to the conclusion that there was some ambiguity in construing the expression "month" used in para 38 of the Scheme under the Provident Fund Act on the premise that the assessee used to pay the salary to its employees only on the 7th day of succeeding month u/s 5 of the Payment of Wages Act. It is true that section 5 of the Payment of Wages Act provided for payment of wages in respect of certain categories of industries on or before the 7th day of succeeding month. However section 4 of the Act provided for fixation of wage period and also provided

that no wage period shall extend one month.

5. Para 29 of the Scheme under the Provident Fund Act provided that the contribution payable should be calculated on the basis of the basic wages and other allowances actually drawn during the whole month whether paid on daily, weekly, fortnightly or monthly basis. The expression "basic wages" is defined as all emoluments, which are earned by an employee while on duty or on leave or on holidays with wages in either case in accordance with the terms of the contract of employment and which are paid or payable in cash to him.

6. Para 30 of the Scheme of the Provident Fund Act imposed an obligation on the employer to remit both the shares of contributions in the first instance and para 32 empowered the employer to recover the employees' contributions from the wages of the employees. As per para 38 of the Scheme, the employer is required to remit both the contributions together with the administrative charges thereon within 15 days before the close of every month.

7. Thus as seen from the above provisions, it is clear that it is the responsibility of the employer to make payment of the contributions at the first instance irrespective of the fact, whether the wages are paid in time or not. Hence the actual payment of wages on the 7th day of succeeding month would not in any way alter the situation and give room for interpreting that the "close of 15th day" has to be calculated from the end of the month in which the wages were actually paid. The payment of wages on the 7th day of succeeding month would not in any way alter the initial responsibility of the employer for making payment of contributions, which he is statutorily authorised to recover from the employees salary, whether the salary is paid in time or not. Hence the one and only reasonable conclusion is that the employer has to remit both the contributions to the Provident Fund within 15 days from the close of the month for which the employees earned their salary i.e., Salary payable. Our view has been fortified by the Division Bench of this court in *Presidency Kid Leather (P) Ltd. v. Regional Provident Fund CIT (1997) 91 F.J.R. 661*, wherein the Division Bench of this court held as follows :

"As per para 38 of the Employees' Provident Funds Scheme, the employer is required to remit both the employees' as well as the employer's share of contributions together with administrative charges thereon before the close of the 15th of every month. Para 30 of the Scheme imposes an obligation on the employer to remit both the shares of contributions in the first instance and para 32 of the Scheme enables the employer to recover the employees contributions from the wages of the employees. The initial responsibility for making payment of the contributions lies on the employer irrespective of the fact whether the wages are paid in time or not. As such, the Provident Fund payments made after the due date will attract the penal damages u/s 14B of the Act."

The Tribunal committed serious error in coming to the contrary conclusion. Hence the first two questions of law referred to us are answered in the negative against the assessee and in favour of the revenue.

8. In respect of the other question, it is true that section 43B overrides section 36(1)(va) of the Income Tax Act, in view of the opening of section with non obstante clause. But the finding arrived at by the Tribunal that even assuming that the due date for the payment of contributions fell within a period of 15 days from the end of the month for which salaries were payable since all the payments have been made in the year itself though with a marginal delay of a few days on certain occasions, no part of the contributions received by the assessee from its employees towards Provident Fund could be disallowed cannot be accepted.

9. A combined reading of clause (va) of sub-section (1) of section 36 and section 43B of the Income Tax Act makes it clear that if the assessee/employer credited any sum received by him from any of his employees covered by section 2(24)(x) of the Income Tax Act in the relevant fund on or before the due date, that is the date by which the assessee (employer) is required to credit the employees' contribution to the employees' account in the relevant fund under any Act, Rules, order or notification issued thereunder, he would be entitled to deduct the said amount in computing his business income. But section 43B controls the allowability of deduction of payment specified in (a) to (a) thereof and provides certain conditions subject to which alone the deductions could be made. Section 43, which commences with a non obstante clause mandates that the amount referred to in any one of the clauses, would" be allowed as deduction in computing the income u/s 28 of the previous year only, in which such sum is actually paid by the assessee, irrespective of the fact that the said deduction is otherwise allowable under the Act and 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 the assessee. The first proviso to section 43B relaxes the rigour of the section, if the sum referred to in clause (a) or clause (d) is actually paid by the assessee 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 any such sum was incurred and evidence of such payment was furnished by the assessee along with such return.

10. The second proviso imposes a further restriction on the allowability of deduction of any sum referred to in clause (b). It provides that 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, it shall not be allowed as deduction. For this purpose, the definition of "due date" as given in the Explanation to clause (va) of sub-section (1) of section 36 is adopted. Sub-clause (x) of clause (24) of section 2 includes within the meaning of "income" 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, or any other fund for the welfare of

such employees. Thus, it is clear that the employees' contribution received by the employer would be "income" in his hands and that would be allowed as permissible deduction under clause (va) of sub-section (1) of section 36 in computing the business income u/s 28 provided the assessee credits the same to the relevant fund. u/s 43B, the sum referred to in clause (b) of section 43B is treated differently, as it relates to the sum payable by the assessee as an employer which included the employer's contribution as well as employees' contribution. If such contributions which were payable to any provident fund or any fund are paid within the due date, the employer will be able to avail of the benefit of deduction u/s 43B. Though section 43B provided for allowability of deduction based on actual payment, the second proviso restricted the same that only when the amounts are paid within the due date as provided under the Act in order to have the allowability of deduction. u/s 43B read with proviso thereto provided that there should be actual payment and further the actual payment should have been made within the due date as prescribed under the Act. If the payments are not made within the due date there is contravention of the provisions of the Provident Fund Act. Under the Income Tax Act, the defaulting assessee are not entitled to the benefit of deduction, which are otherwise allowable to them under the scheme of the provisions of the Act. This is to ensure that the beneficial legislations are complied with strictly. Hence the reasoning given by the Tribunal that the provisos are meant to helpmate the main section rather than hinder its course and the tail cannot wag its head, cannot at all be accepted so as to give contrary meaning to the important express provisions employed in the Indian Income Tax Act. The proviso could also be a condition precedent to the main section.

11. The same view has been expressed by the Andhra Pradesh High Court in [Hitech \(India\) Pvt. Ltd. Vs. Union of India and Others](#), , when the constitutional validity of section 43 and section 36(1)(va) of the Income Tax Act has been challenged insofar as they provided for disallowance of employers' contribution to Provident Fund, contribution to the Employees' State Insurance Fund and payment of employees' contribution to the Provident Fund and contribution to the Employees State Insurance Fund, when the same are paid after the due date as provided in the respective Act. After considering section 43B and section 36(1)(va), the Andhra Pradesh High Court has held that if the payment is not made there is contravention of the provisions of the Employees' Provident Funds Act and the Employees' State Insurance Act for which provision is made by way of payment of interest, damages and prosecution. But under the Income Tax Act, the defaulter loses the benefit of deduction which is otherwise allowable to him under the scheme of the provisions of the Act. Whereas the beneficial legislations in favour of the employees provides for compliance on the pain of payment of interest, damages and prosecution, the Income Tax Act provides for compliance by denying the benefit of deduction which is otherwise available. This is only meant to ensure prompt payment.

12. Hence the third question also has to be answered in favour of the revenue and against the assessee and accordingly the said question is answered. However, there is no order as to costs.