

IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN
BEFORE S/SHRI CHANDRA POOJARI, AM & GEORGE GEORGE K., JM

I.T.A. No.51 /Coch/2019
Assessment Year : 2014-15

Shri K.K. Purushothaman, 31/469, Naduvile Veedu, Muthoor, Thiruvalla, Pathanamthitta. [PAN: AJJPK 1993J]	Vs.	The Income Tax Officer, Ward-III, Thiruvalla.
(Assessee-Appellant)		(Revenue-Respondent)

Assessee by	Smt. Meera V. Menon, Adv.
Revenue by	Smt. A.S. Bindhu, Sr. DR

Date of hearing	19/06/2019
Date of pronouncement	19/06/2019

ORDER

Per CHANDRA POOJARI, AM:

This appeal filed by the assessee is directed against the order of the CIT(A), Kottayam dated 06/08/2018 and pertain to the assessment year 2014-15.

2. At the outset, there was a delay of 79 days in filing the appeal before the Tribunal. The Id. AR has filed condonation petition accompanied by an affidavit dt. 16/03/2019 wherein it was stated that the assessee was laid up and was under medical treatment on account of Sciatica from 10/10/2018 to 20/12/2018. After recovering from the

illness, the assessee tried to contact his counsel at Ernakulam, but he was informed that on account of Christmas holidays, he was available only on 04/01/2019 after re-opening of the High Court. Hence, the appeal was prepared on 09/01/2019 and filed on 10/01/2019. Thus, there was delay of 79 days in filing the appeal. It was submitted that the delay was not deliberate and was beyond the control of the assessee. Hence, it was prayed that the Tribunal may condone delay of 79 days in filing the appeal and the appeal may be disposed of on merits. The Ld. AR has also filed medical certificate dated 20/12/2018 from Kottakal Arya Vaidya Sala, Thiruvalla stating that the assessee was suffering from Sciatica and was advised rest from 10/10/2018 to 20/12/2018.

2.1 We have heard the rival submissions and gone through the reasons advanced by the assessee for filing the appeal belatedly before this Tribunal. We are satisfied with the reasons explained by the assessee for filing the appeal belatedly. Accordingly, we condone the delay of 79 days in filing the appeal and admit the appeal for adjudication.

3. The assessee has raised the following grounds of appeal:

A: The orders of the authorities below in so far as they are against the appellant are opposed to law, facts and circumstances of the case.

B: The averments made before the first appellate authority, by way of written submissions have not been taken into account by the said authority.

C: The appellant is eligible for deduction under Section 36 (VA) of the Income Tax Act and the finding to the contrary by the lower authorities are without any justification and arbitrary.

D: Section 36 (VA) provides for deduction of amounts shown in the profit and loss account representing the employees contribution to the PF from the gross income of the assessee. The appellant had not claimed remittance to the employees welfare fund and the returned profit is not after deduction of remittance of employees welfare fund from the gross received. These aspects were not properly appreciated by the authorities below.

E: The fact that welfare fund amount received from employees and remitted to the Government is not claimed as a deduction from the gross income and therefore there is no violation of Section 36 (VA) ought to have been considered by the authorities below.

F: The remittance of the PF amount before the dues date of filing of return is an allowable deduction under Section 43B is not considered by the authorities below. It is only those amounts not paid by the due date of filing of return under the IT Act that are to be added to the income return.

G: The issue at hand had been already decided by the Hon'ble Apex Court in the decision reported as *Principal Commissioner of Income Tax Vs. Rajasthan State Beverages Corporation Ltd.* (2017) 84 *Taxman.com* 185 in favour of the assessee. Though this judgment is relied on before the first appellate authority, he has sought to bypass the said dictum taking the view that the finding is only in an SLP and not in a civil appeal. This interpretation by the first appellate authority is without any justification and arbitrary.

H: The other grounds will be raised at the time of hearing.

4. The facts of the case are that the assessment under section 143(3) of the I.T. Act was completed on 05.12.2016 determining the total income at Rs.9,54,020/-. Subsequently, the Assessing Officer issued a notice under section 154 of the Act to disallow the contribution received from employees towards EPF under section 36(1)(va) of the Act which was not responded by the assessee. The Assessing Officer found that an amount of Rs.8,07,072/- received as contribution from employees was

not seen remitted within the due date. According to the Assessing Officer, as per Section 36(1)(va) of the Act, deduction in respect of any sum received by the taxpayer as contribution from his employees towards any welfare scheme of such employees is allowed only if such sum is credited by the taxpayer to the employees's account in the relevant fund on or before the due date. The Assessing Officer found that here the employer had not remitted within the due date for payment. Since the mistake is apparent from the face of the record, the Assessing Officer passed an order under section 154 of the Act on 01.02.2018 and disallowed Rs. 8,07,972 under section 36(1)(va) of the Act.

5. Before the CIT(A), the assessee relied on the judgment of the Rajasthan High Court in the case of Pr. CIT vs. Rajasthan Beverages Corporation Ltd. (250 taxman 32) wherein it was held as under:

“Section 43B, read with section 36(1)(va) of the Income-tax Act, 1961 – business disallowance – Certain deductions to be allowed only on actual payment (PF and ESI contribution) – Whether amount claimed on payment of PF and ESI having been deposited on or before due date of filing of returns, same could not be disallowed under section 43B or under section 36(1)(va). – Held, yes in favour of assessee.”

The assessee also relied on the judgment of the Supreme Court in SLP in the case of Rajasthan State Beverages Corporation Ltd. (250 Taxman 16) wherein it was held as under:

“Section 43B, read with section 36(1)(va), of the Income-tax Act, 1961 – Business disallowance – Certain deductions to be allowed only on actual payment

(PF and ESI contribution) – High Court by impugned order held that amount claimed on payment of PF and ESI having been deposited on or before due date of filing of returns same could not be disallowed under section 43B or under section 36(1)(va) – Whether SLP against said impugned order was to be dismissed – Held, yes in favour of assessee."

5.1 However, the CIT(A) observed that the question, whether dismissal of SLP amounts to laying down law in respect of the issue disputed under SLP, has been considered by the ITAT in the case of Moradabad Development Authority, 89 taxmann.com 263 and it was held as under:

"4. Further, it is a settled legal position that a summary dismissal of SLP cannot be construed as a declaration of law by the Hon'ble Supreme Court under Article 141 of the Constitution. A mere dismissal of SLP without giving any reasons, cannot be equated with exposition of law by the Hon'ble Supreme Court so as to indicate the imprimatur on the reasoning and/or the ratio decidendi of the High Court in the judgment. In such circumstances, there is no merger of the judgment of the Hon'ble High Court. The Hon'ble Apex Court in Hemalatha Gargya v. CIT (2003) 259 ITR 1/128 Taxman 190, has held that dismissal of SLP in limine: "could not operate as a confirmation of the reasoning in the decision sought to be appealed against.....".

Similar view has been taken by the Hon'ble Supreme Court in Kunhayammed v. State of Kerala (2000) 245 ITR 360/113 Taxman 470, in which their Lordships have held that an order refusing special leave to appeal does not stand substituted in place of order under challenge. In the hue of the above discussion, it is amply vivid that the mere dismissal of SLP by the Hon'ble Supreme Court against the judgment of the Hon J&K High Court in the case of Jammu Development Authority cannot be construed as having the effect of elocution of law by the Hon'ble Supreme Court on the subject against the assessee."

5.2 In the light of the decision of the Tribunal, the CIT(A) observed that the assessee cannot rely on the decision of the Supreme Court in the case of Rajasthan State Beverages Corporation Ltd. 84 taxmann.com 185 to claim relief. Further, it was

observed that the the issue of allowability of deduction under section 36(1)(va) of the Act on the employees contribution towards EPF was covered against the assessee by the decision of the High Court of Kerala in the case of Merchem Ltd, (378 ITR 443) wherein it was held that the deduction under section 36(1)(va) is available to the assessee only if the payment is deposited before the due date specified in that section. Hence, the CIT(A) held that the assessee is not entitled for deduction of contribution of employees u/s. 36(1)(va) of the Act.

6. Against this, the assessee is in appeal before us. The Ld. AR submitted that the EPF amount was remitted before the due date of filing of return of income and therefore, no disallowance under section 36(1)(va) of the Act can be made. The learned AR also relied on the decision of Hon'ble Supreme Court in the case of Rajasthan State Beverages Corporation Ltd, 84 taxmann.com 185.

7. The Ld. DR relied on the order of the CIT(A).

8. We have heard the rival submissions and perused the record. In our opinion, this issue is squarely covered against the assessee by the judgment of the Jurisdictional High Court in the case of Popular Vehicles and Services Pvt. Ltd. vs. CIT (406 ITR 150) wherein it was held has under:

"Held, dismissing the appeal, the employees' contribution was covered by clause (va) of section 36(1) and the deduction was restricted by the Explanation below it. If the employer's contribution under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 and the Employees' State Insurance Act, 1948 for the financial year 2007-08 was paid after the year but before the date of filing of the return for that year, it was allowable as a deduction in the assessment year, de hors the fact that it was paid in the subsequent year. Since the employees' contribution was collected from the employees as a deduction in their salary itself it would in effect be income of the assessee, as had been indicated in the definition of "income" under section 2(24)(x). The employees' contribution towards the funds was regulated by sub-clause (x) of section 2(24) and clause (va) of section 36(1) and would not be affected by section 43B. The non obstante clause of section 43B had no effect in so far as the employees' contribution which was specifically covered by clause (va) of section 36(1). By virtue of the Explanation below clause (va), no deduction could be claimed if the contribution had not been paid after collection from the employees by way of deduction from their salaries, within the due date under the labour welfare Acts. The deletion of a proviso under section 43B could not render otiose the Explanation under section 36(1)(va)."

8.1 In view of above judgment of the Jurisdictional High Court cited supra, we are inclined to dismiss this ground taken by the assessee.

9. In the result, the appeal filed by the assessee is dismissed.

Order pronounced in the open Court on this 19th June, 2019

(GEORGE GEORGE K.)
JUDICIAL MEMBER

(CHANDRA POOJARI)
ACCOUNTANT MEMBER

Place: Kochi
Dated: 19th June, 2019

GJ

Copy to:

1. Shri K.K. Purushothaman, 31/469, Naduvile Veedu, Muthoor, Thiruvalla, Pathanamthitta.
2. The Income Tax Officer, Ward-III, Thiruvalla.
3. The Commissioner of Income-tax(Appeals), Kottayam.
4. The Pr. Commissioner of Income-tax, Kottayam.
5. D.R., I.T.A.T., Cochin Bench, Cochin.
6. Guard File.

By Order

(ASSISTANT REGISTRAR)
I.T.A.T., Cochin

		Date	
1.	Draft Order dictated on	19/06/2019	Sr.PS
2.	Draft Order placed before author	19/06//2019	AM
3.	Approved draft comes back		Sr. PS
4.	Fair order placed before the author.		AM
5.	Fair order placed before the Second Member for signature		JM
6.	Pronouncement on		
7.	File sent to the Bench Clerk		
8.	Date on which file goes to the AR		
9.	Date on which file goes to the Head Clerk.		
10.	Date of dispatch of Order.		