

आयकर अपीलुीय अधलकरण, 'डी' नुयायपीठ, चेन्नई।  
**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**'D' BENCH: CHENNAI**

शुी एन.आर.एस. गणेशन, नुयायलक सदसुय एवं  
शुी रमलत कुओर, लेखल सदसुय के समकुष

**BEFORE SHRI N.R.S. GANESAN, JUDICIAL MEMBER AND**  
**SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

**ITA No.693/Chny/2017**

नुलधलरण वरुष / **Assessment Year: 2013-14**

M/s.Selva Gold Covering Pvt. Ltd.,  
No.1127, Ribbon Building,  
Big Bazaar Street,  
Coimbatore-641 001.

**v.** The Deputy Commissioner of  
Income-tax,  
Corporate Circle-2,  
Coimbatore-641 018.

**[PAN: AADCS0688Q]**

(अपीललरुथी/**Appellant**)

(प्रतुयरुथी/**Respondent**)

अपीललरुथी कुी ओर से/ Appellant by

: Mr.N.Arjunraj , Adv.

प्रतुयरुथी कुी ओर से /Respondent by

: Ms.R.Anitha, JCIT

सुनवलई कुी तलरुीख/Date of Hearing

: 11.11.2019

कुषुषणल कुी तलरुीख /Date of Pronouncement

: 25.11.2019

**आदेश / ORDER**

**PER RAMIT KOCHAR, ACCOUNTANT MEMBER:**

This appeal filed by assessee is directed against appellate Order dated 30.12.2016 passed by learned Commissioner of Income Tax (Appeals)-1, Coimbatore (hereinafter called "the CIT(A)"), in appeal No.49/16-17 for assessment year (ay) 2013-14, the appellate proceedings before learned CIT(A) had arisen from assessment order dated 21.03.2016 passed by learned Assessing Officer (hereinafter called "the

AO") u/s.143(3) of the Income-tax Act, 1961 (hereinafter called "the Act").

2. The grounds of appeal raised by assessee in memo of appeal filed with the Income-Tax Appellate Tribunal, Chennai (hereinafter called "the Tribunal") read as under:-

*"1. The learned Commissioner of Income-tax (Appeals) in his Appellate order ITA 49/16-17 dated 30.12.2016 has passed Appellate orders confirming and upholding the Addition made by the Assessing Officer for the Assessment Year 2013-14 representing the claim of Deduction of P.F. and E.S.I. contribution of Employees amounting to Rs.33,32,061/-. It is claimed in this Appeal that the above cited order of the learned C.I.T. (Appeals) is erroneous and is not in accordance with the provisions of law aid the same is contrary to the judicial decisions rendered on the issue.*

*2. The learned C.I.T.(Appeals) is not justified in concluding that the P.F. and E.S.I. contributions of the Employees if they are not paid within the due dates specified under the respective statutes cannot be allowed as a deduction.*

*3. The stand taken by the learned C.I.T.(Appeals) that the provisions of Section 43B cannot be applied to the contributions of Employees towards P.F. and E.S.I. that they are only covered under Sec.36 (1)(va) and explanation appearing on this.*

*4. While many judicial decisions have rendered favourable verdict on the issue, the learned C.I.T.(Appeals) is not justified in relying on the unfavourable decision rendered by the Gujarath High Court in the case of C.I.T. Vs Gujarath State Transport Corporation (366 ITR 170) and Kerala High Court's decision in the case of C.I.T.Vs Merchem Ltd. (378 ITR 443) alone to confirm the addition.*

*5. The learned C.I.T.(Appeals) is not justified in relying on the Board's Circular No. 22/2015 dated 17.12.2015/ He failed to note that the Board's Circular is contrary to the principles of law established.*

*6. The learned C.I.T.(Appeals) failed to note that clause (b) of Section 43B also includes Employees contribution to P.F. since the remittance of such contribution is also the legal obligation of the employer. This could be confirmed by the fact that after clause (b) a provision was added to regarding the necessity on the part of the employees to adhere to the due dates prescribed under Section 36 (1)(va) of the Act. Hence, the learned C.I.T. (Appeals) is not correct in concluding that the obligations referred to*

in Section 36 (1)(va) or the Explanation to this Section is not to be considered under Sec. 43B.

7. The C.I.T.(Appeals) ought to have noted that after deletion of the above cited requirement in the provisions of Section 43B, the Appellant Company would be eligible to claim deduction of the amount of Employees contributions to P.F. and E.S.I, before the due date for filing the Return of Income under Section 139(1).

8. The learned C.I.T.(Appeals) is not justified in taking a stand that the decision of the Supreme Court in the case of C.I.T. Vs Alom Extrusions (319 ITR 306) does not deal with Employees contribution which are covered under Sec. 36 (1)( a) but only deals with the retrospective amendment of Section 43B and hence the decision of the Supreme Court cannot be applied in case of P.F. and E.S.I. Employees contributions that are remitted beyond the due date specified in the respective statute.

9. On the other hand the learned Commissioner of Income-tax (Appeals) ought to have gone through the text of the Supreme Court's decision in the case of Alom Extrusions. The Supreme Court in their order clearly refer to the Employees' contribution to be treated as Income under Sec. 2(24)(x) and deal with the omission of second proviso to Section 43B in this regard and make reference of the provisions of Section 36 (1) (va).

10. Hence it is clear that the Hon'ble Supreme Court has clearly held that with the omission of the second proviso, the Employees contribution if remitted within the due dates prescribed under Sec. 139 (1) shall be eligible for deduction. Hence there is no justification in holding that Section 43B does not deal with allowability of Employees contribution.

11. The learned C.I.T.(Appeals) ought to have followed the binding decision of the Madras High Court in the case of Commissioner of Income-tax Vs M/s Industrial Security and Intelligence India Pvt. Ltd. (Tax Case Appeal No. 585 and 586 of 2015 dated 24.07.2015) wherein the Honorable High Court has clearly concluded that the Employees contribution to P.F. and E.S.I. paid within the due dates for filing the Return prescribed under Sec.139 (1), can be allowed as a deduction following the verdict of Supreme Court and also the decision of the Delhi High Court in the case of C.I.T. Vs AIMIL Ltd. (321 ITR 508).

12. For these or any other grounds that may be raised at the time of hearing of appeal, it is prayed that the Honorable Tribunal may be pleased to pass orders deleting the Addition made amounting to Rs.33,32,061/- representing the claim of Deduction of P.F. and E.S.I, contribution of employees and pass orders dismissing the Appellate order of the C.I.T. (Appeals) and render justice."

3. Briefly stated facts of the case are that assessee is in business of wholesale and retail trading of gold covering jewellery. The only effective

issue in this appeal is with respect to disallowance by AO of ₹33,32,061/- towards employee's contribution of Provident Fund(PF) & Employees State Insurance(ESI) deducted by assessee from salaries of employees(called as employees contribution) which was deposited late beyond the due date prescribed under relevant statutes governing PF and ESI for deposit of said PF and ESI contribution, which in the opinion of Revenue has infringed provisions of Section 36(1)(va) of the 1961 Act, therefore as per Revenue said sum is liable to be assessed as income in the hands of assessee by invoking provisions of Section 2(24)(x) r.w.s. 36(1)(va) of the 1961 Act. It is admitted position between rival parties that an aggregate amount of ₹ 33,32,061/- was deducted by assessee on account of employees contribution towards PF and ESI from salaries of employees during previous year relevant to impugned ay , and the said amount was deposited by assessee beyond due date prescribed for deposit of PF and ESI under the relevant statutes governing PF and ESI , but however admittedly the said amount of ₹ 33,32,066/- was deposited by assessee before the due date prescribed for filing of return of income u/s 139(1) of the 1961 Act. The assessee contended before AO that as per provisions of Section 43B of the 1961 Act, since said amount was paid before the due date prescribed for filing of return of income u/s 139(1) of the 1961 Act, the said amount cannot be brought to tax in the hands of the assessee. The AO was of the view that it is only employer contribution which shall get shelter u/s 43B of the 1961 Act if the same is deposited on or before the due date prescribed for filing of return of income u/s 139(1) of the

1961 Act but employee contribution paid belatedly beyond the time prescribed for payment under the relevant statute governing PF and ESI, is hit by provisions of Section 36(1)(va) read with Section 2(24)(x) of the 1961 Act. The AO relied upon decision of Hon'ble Gujarat High Court in the case of CIT v. Gujarat State Road Transport Corporation reported in 41 taxmann.com 100 (Guj) /2014 (366 ITR 170) and also decision of Hon'ble Kerala High Court in the case of CIT v. Merchem Ltd., reported in (2015) 61 taxmann.com 119 (Kerala) , to hold that employee contribution towards PF and ESI which was deducted by assessee from salaries of the employees and which stood deposited beyond the due date prescribed for deposit of PF and ESI as provided under relevant statute governing PF and ESI shall be deemed to be income of the assessee keeping in view provisions of Section 36(1)(va) read with Section 2(24)(x) of the 1961 Act. The AO also referred to CBDT Circular No.22/2015 in F.No.279/Misc./140/2015-ITJ dated 17.12.2015 for making additions to the income of the assessee for belated deposit of employee contribution of PF and ESI, vide assessment order dated 21.03.2016 passed by AO u/s 143(3) of the 1961 Act

4 Aggrieved by an assessment framed by AO u/s 143(3) of the 1961 Act vide assessment order dated 21.03.2016 , the assessee filed first appeal with learned CIT(A) which stood dismissed by learned CIT(A) vide appellate order dated 30.12.2016, by following aforesaid decisions of Hon'ble Gujarat High Court in the case of CIT v. Gujarat State Road

Transport Corporation (supra) and also decision of Hon'ble Kerala High Court in the case of CIT v. Merchem Ltd. (supra) as well aforesaid CBDT circular dated 17.12.2015.

5. Aggrieved by an appellate order dated 17.12.2015 passed by learned CIT(A), the assessee has now filed an appeal before the tribunal. The Ld.Counsel for the assessee drew our attention to the decision of Hon'ble Madras High Court in the case of CIT v. M/s.Industrial Security & Intelligence India Pvt. Ltd. in TCA No. 585 and 586 of 2015 , vide judgment dated 24.07.2015, for ay: 2003-04 and 2004-05 . The reliance was also placed by learned counsel for the assessee on decision of co-ordinate Bench of Chennai-tribunal in the case of ACIT v. Carat Lane Trading Private Limited reported in (2018) 89 taxmann.com 434(Chennai-trib.) for ay: 2012-13 , to which one of us being Hon'ble Judicial Member was part of the Division Bench of Chennai-tribunal which pronounced the said order. the Ld.DR, on the other hand, supported appellate order passed by learned CIT(A).

6. We have considered rival contentions and perused the material on record. We have observed that assessee is in the business of wholesale and retail trading of gold covering jewellery. We have observed that assessee had deducted PF & ESI share of employees contribution from salaries of employees to the tune of ₹33,32,061/- in aggregate during the year under consideration, which admittedly was deposited late by assessee beyond due date prescribed for deposit of PF/ESI under relevant

statutes governing PF & ESI, but admittedly said amounts of employees contribution towards PF/ESI deducted by assessee from employees salaries were deposited by assessee before due date prescribed for filing of return of income u/s.139(1) of the 1961 Act. We have observed that Hon'ble Madras High Court in the case of CIT v. M/s.Industrial Security and Intelligence India Pvt. Ltd. (supra) for ay: 2003-04 and 2004-05 has held that if employees contribution of PF and ESI deducted from employees salary is deposited before due date prescribed u/s.139(1) of 1961 Act, the deduction for same shall be allowed , by holding as under:

*"2. The brief facts of the case are as follows:*

*The respondent/assessee filed its return of income for the assessment years in question. The said returns were processed and were not selected for scrutiny. Subsequently, the Assessing Officer noticed that there was escapement of income and hence reopened the assessments under Section 147 of the Income Tax Act by issuing notice under Section 148 of the Income Tax Act. While completing the re-assessment, the Assessing Officer disallowed the expenses claimed by way of Employee's contribution to PF and ESI holding that the assessee had not paid the employee's contribution of PF and ESI within the due dates specified under the respective Act. Aggrieved by the said order of assessment, the assessee preferred appeals before the Commissioner of Income Tax (Appeals) challenging the reopening as well as the disallowance. The Commissioner of Income Tax (Appeals) sustained the order of the assessment, thereby dismissed the appeals. Aggrieved by the same, the assessee preferred further appeals before the Tribunal. The Tribunal relied upon the decision of the Supreme Court in the case of CIT V. Alom Extrusions Ltd. reported in 319 ITR 306, decision of the Delhi High Court in the case of CIT V. Amil Ltd. reported in 321 ITR 508 and that of the Co-ordinate Bench of the Tribunal in the case of M/s.Venkateswara Electrical Industries P. Ltd. V. DCIT in ITA Nos.1344, 1345 and 1636/Mds/2014 dated 28.8.2014 held as follows:*

*"5. Heard both sides. Perused orders of lower authorities and the decisions relied on before us. It is not in dispute that all these payments of provident fund Rs.16,20,571/- and ESI Rs.17,51,490/- were made beyond the grace period/due date allowed under Provident Fund & ESI Acts but before due date for filing of income-tax return. This issue has been decided in favour of the assessee by various High Courts following the decision of the Hon'ble Supreme Court in the case of CIT Vs. Alom Extrusions Ltd. (319 ITR 306), wherein the Hon'ble Supreme Court held that omission of second proviso to section 43B and amendment of first proviso by Finance Act, 2003 are*

curative in nature and are effective retrospectively and thus with effect from 1.4.1988 i.e. the date of insertion of first proviso. The co-ordinate Bench of this Tribunal considering a similar issue in the case of *M/s.Venkateswara Electrical Industries P. Ltd. Vs. DCIT (supra)* following the decision of Hon'ble Delhi High Court in the case of *CIT Vs. Amil Ltd. (321 ITR 508)* held that even the employees contribution to provident fund is to be allowed as deduction if it is paid within due date for filing of return. While holding so, the Tribunal observed as under:-

"6. We have heard the submissions made by the representatives of both the sides and have perused the orders of the authorities below, as well as the judgments/decisions relied on by the Id. Counsel for the assessee. It is an undisputed fact that there has been delay in remittance of employees contribution of ESI and Provident Fund in both the AYs i.e., 2008-09 & 2009-10. It is equally un-disputed that the assessee has deposited the amount towards employees contribution of ESI and Provident Fund before the due date of filing of return. The Hon'ble Delhi High Court in the case of *Cit Vs. Amil Ltd.*, reported as 321 ITR 508 has held that if the assessee had deposited employees contribution towards Provident Fund and ESI after due date as prescribed under the relevant Act but before the due date of filing of return under the Income Tax Act, no dis-allowance could be made in view of the provisions of section 43B as amended by the Finance Act, 2003. The decision of the Hon'ble Delhi High Court has been followed by the co-ordinate bench of the Tribunal in the case of *JCIT Vs. M/s.S.M.Apparels (P) Ltd. (supra)*. The Tribunal has been consistently following the view taken by the Hon'ble Delhi High Court. Accordingly, we hold that the assessee is entitled to claim expenditure on employee's contribution towards ESI and Provident Fund for both the AYs. Accordingly, both the appeals of the assessee are allowed."

6. Respectfully following the above, decision, we direct the Assessing Officer to delete disallowances made under section 43B of the Act for both these assessment years. The grounds of appeal raised by the assessee are allowed."

3. Aggrieved by the said order of the Tribunal, the Revenue is before this Court.

4. Heard learned Standing Counsel appearing for the Revenue and perused the materials placed before this Court.

5. We find that the Tribunal has rightly relied on the decision of the Supreme Court in the case of *CIT V. Alom Extrusions Ltd.* reported in 319 ITR 306, whereby, the Supreme Court held that omission of second proviso to Section 43B and amendment to first proviso by Finance Act, 2003 are curative in nature and are effective retrospectively, i.e., with effect from 1.4.1988 i.e., the date of insertion of first proviso. The Delhi High Court in the case of *CIT V. Amil Ltd.* reported in 321 ITR 508 held that if the assessee had deposited employee's contribution towards Provident Fund and ESI after due date as prescribed under the relevant Act, but before the due date of filing of return under the Income Tax Act, no disallowance could be made in view of the provisions of Section 43B as amended by Finance Act, 2003.

6. In the present case, the assessee had remitted the employees contribution beyond the due date for payment, but within the due date for filing the return of income. Hence, following the above-said decisions, we find no reason to differ with the findings of the Tribunal. Accordingly, we find no question of law much less any substantial question of law arises for consideration in these appeals.

*Accordingly, both the Tax Case (Appeals) stand dismissed. No costs. Consequently, M.P.No.1 of 2015 is also dismissed."*

For sake of completeness , we would like to refer to decision in writ petition taken by single judge of Hon'ble Madras High Court in the case of Unifac Management Services ( India) Private Limited v. DCIT in WMP No. 6461 of 2018, while judgment dated 23.10.2018( reported in (2018) 409 ITR 225(Mad.), wherein a contrary view is taken by single judge of Hon'ble Madras High Court. This issue is not free from controversy as it is observed that different High Courts across India have taken a different view on this issue.

We have also observed that Chennai-tribunal in the case of ACIT v. Carat Lane Trading Pvt. Ltd. in ITA No.213(Mds.) of 2017 vide orders dated 28.12.2017 for ay: 2012-13 reported in [2018] 89 taxmann.com 434 (Chennai-Trib.) has decided this issue in favour of the tax-payer, wherein, it has been held that employees contribution towards towards PF & ESI deducted by an employer from salaries of employees if deposited before due date prescribed for filing of return of income u/s.139(1) shall be allowed as deduction and shall not be hit by provisions of Section 36(1)(va) keeping in view provisions of Section 43B of the 1961 Act , by holding as under:

*"8. On the disallowance of PF & ESI:*

*The AO disallowed Rs. 7,10,666/- employees contribution & ESI Rs. 73,244/- which was remitted to Government before the due date and filed return u/s. 139(1). The CIT(A) held as under:*

*"22. I have carefully perused the facts in issue, submissions made by the appellants and material on record. As regards the disallowance of delayed payment*

*on employees contribution to PF is concerned, it will serve useful purpose to refer to Circular NO.22/2015 dated 17.12.2015 in F.No. 279/Misc./140/ 2015-ITJ. It has been clarified therein, that the Apex Court decision in the case of CIT v. Alom Extrusions Ltd. 185 Taxman 416 has been accepted with regard to the employer's contribution to the PF Fund or Superannuation Fund or Gratuity Fund if deposited on or before the due date. No disallowance could be made u/s 438 of the Act. It has also been contribution to Welfare Funds governed by s.36(1)(va). However, in view of the jurisdictional High Court's decision dated 24.7.2015 in the case of CIT v. Industrial Security and Intelligence India (P.) Ltd. in TC (A) NO.585 & 586 of 2015 and MP No.1 of 2015, it has been held therein placing reliance on the Delhi High Court's decision in the case of Aimil Ltd. 321 ITR 508, that if the assessee had deposited employees contribution towards PF and ESI after the due date as prescribed under the relevant Act, but before the due date of filing of the return under the Income Tax Act, no disallowance could be made in view of the provisions u/s.43B as amended by Finance Act 2003. Respectfully following the ratio laid down by the Hon'ble High Court, the plea of the appellant is allowed. This ground of appeal is allowed."*

*8.1 The Revenue's relevant grounds of appeal are as under:*

*"4. The learned CIT(A) has erred in deleting the addition made in respect of employees contribution towards PF & ESI of Rs.7,83,910/- which was remitted beyond the prescribed due dates*

*4.1 The learned CIT(A) erred in deleting the addition made in respect of delayed remittance of its employees contribution of Provident Fund despite the fact that Circular No.22/2015 dated 17.12.2015 clearly applies to claim of deduction relating employers' contribution and not for employees contribution to welfare funds.*

*4.2 The learned CIT(A) failed to appreciate that any received sum received on account of employees' contribution to Provident Fund & ESI not remitted within the due date is to be treated as the income of the assessee and taxed in his hands as per provisions of Sec.2(24)(x) of the LT. Act, 1961."*

*8.2 The DR assailed the order of the CIT(A) based on the assessment order and on the above grounds of appeal. Per contra, the AR submitted that the return was filed on 28.09.2012 and the remittances were made before the due date on filing return. Although, the CIT(A) deleted the disallowance based on the jurisdictional High Court decisions still the department has filed this appeal.*

*9. We heard the rival contentions. Since, the CIT(A) has applied the ratio of the jurisdictional High Court, his order in this regard does not require interference. The corresponding grounds of Revenue's appeal are dismissed.*

*10. In the result, the Revenue's appeal is dismissed."*

Respectfully following the aforestated decision(s) of Division Bench of Hon'ble Jurisdictional High Court in the case of Industrial Security & Intelligence India Private Limited(supra) and co-ordinate Bench of this tribunal in the case of Carat Lane Trading Pvt. Ltd.(supra), we decide this

issue in favour of the assessee and hold that employees contribution towards PF and ESI deducted by assessee from salaries of employees which is deposited by assessee beyond the due date prescribed under relevant statutes governing PF and ESI, but deposited prior to due date of filing of return of income u/s.139(1) of the 1961 Act shall be allowed as deduction and we direct deletion of the additions made to the income of the assessee. The assessee succeeds in its appeal filed with tribunal. We order accordingly.

In the result, appeal filed by assessee in ITA No.693/Chny/2017 for ay: 2013-14 is allowed.

Order pronounced on the 25<sup>th</sup> day of November, 2019 in Chennai.

**Sd/-**

(एन.आर.एस. गणेशन)

**(N.R.S. GANESAN)**

न्यायिक सदस्य/**JUDICIAL MEMBER**

**Sd/-**

(रमित कोचर)

**(RAMIT KOCHAR)**

लेखा सदस्य/**ACCOUNTANT MEMBER**

चेन्नई/Chennai,

दिनांक/Dated: 25<sup>th</sup> November, 2019.

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आदेश की प्रतिलिपि अग्रेषित/**Copy to:**

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त (अपील)/CIT(A)
4. आयकर आयुक्त/CIT
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF