(2012) 03 AHC CK 0224

In the Allahabad High Court

Case No : Income Tax Appeal No. 480 of 2008

Commissioner of Income Tax and Another APPELLANT

Vs

Manoj Kumar Singh RESPONDENT

Date of Decision : 12-03-2012

Acts Referred:

Income Tax Act, 1961 — Section 139, 2(24)(x), 260A, 28, 36

Citation : (2012) 349 ITR 230

Hon'ble Judges : Vinay Kumar Mathur, J;Ashok Bhushan, J

Bench : Division Bench

Advocate : A.N. Mahajan, for the Appellant; Ashish Bansal, for the Respondent

Final Decision : Dismissed

Judgement

1. Heard learned standing counsel for the income tax Department and Shri Ashish Bansal appearing for the assessee. This income tax appeal has been filed against the judgment and order dated January 11, 2008, passed by the income tax Appellate Tribunal in I.T.A. No. 562/Luc/2007.

2. The Assessing Officer by assessment order dated November 16, 2006, has disallowed the claim of the late payment of PF and ESI. The provident fund and ESI contributions were to the extent of Rs. 12,36,139 which was paid by the assessee before filing of the return and proof of payment was submitted before the Assessing Officer. The Assessing Officer had issued a show-cause notice requiring to show cause as to why the amount deposited in the account of each employee after due date may not be deducted under the provision of section 43B read with section 36(1) sub-section (va) of the income tax Act. The assessee submitted the reply to the show-cause notice. The Assessing Officer disallowed the claim holding that the payments were not made by due dates. The following observations were made by the Assessing Officer while rejecting claim:

In view of the above discussion, it is clear that due date of credit of contribution by way of P.F. and E.S.I. in the shape of contribution by the employer and employee the due date is 15th of each following month in which/for which pay was drawn. In these circumstances, the submission of the assessee is hereby rejected as the assessee has violated the provisions of section 43B read with section 36(1)(va) (Explanation as well as section 2(24)(x)) of the income tax Act, 1961. Therefore, the amount of Rs. 12,36,139 is hereby disallow u/s 43B of the income tax Act, 1961, and the same is added back in the income of the assessee for the period under, consideration.

3. An appeal was filed by the assessee which appeal was partly allowed and relief of Rs. 12,36,139 which were claimed by the assessee as payment towards the contribution in P.F. and E.S.I. have been accepted. The Department filed an appeal before the income tax Appellate Tribunal which was dismissed by order dated January 11, 2008.

4. This appeal has been filed by the Department u/s 260A of the income tax Act, 1961, against the order of the Appellate Tribunal.

5. The learned counsel for the Department submitted that the provisions of section 43B proviso, as was amended with effect from April 1, 2004, by the Finance Act, 2003, shall not come to the rescue of the assessee since the amendment was not retrospective and the deposits were made by the assessee prior to April 1, 2004. He submits that the said benefit was not available to the assessee and the Commissioner of income tax as well as the Appellate Tribunal erred in rejecting the case of the Department.

6. Learned counsel for the assessee, refuting the submission of learned counsel for the Department, submitted that the amendments made in section 43B proviso with effect from April 1, 2004, by the Finance Act, 2003, is retrospective in nature and shall cover the deposits made towards the provident fund contribution even before April 1, 2004. In support of the submission he has placed reliance on the judgment of the apex court in the case of Commissioner of Income Tax Kolkata-III Vs. Alom Extrusions Limited, .

7. We have considered the submissions of learned counsel for the parties and perused the record.

8. The main question which needs consideration in the present case is with regard to the claim of the assessee u/s 43B proviso. Section 43B proviso, as existed before the amendments made by the Finance Act, 2003, was to the following effect:

Provided that nothing contained in this section shall apply in relation to any sum referred to in clause (a) or clause (c) or clause (d) or clause (e) or clause (f), 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-section (1) of section 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:

Provided further that no deduction shall, in respect of any sum referred to in clause (b), be allowed 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 as defined in the Explanation below clause (va) of sub-section (1) of section 36, and where such payment has been made otherwise than in cash, the sum has been realised within fifteen days from the due date.

9. Learned Commissioner of income tax recorded a finding in paragraph 4(ii) which is to the following effect:

4(ii) I have considered the submission of the authorised representative and perused the assessment order. It is a fact that the assessee has paid the amounts on account of employer''s and employees contribution in the next month of deduction but these are delayed payments. It is also correct that all the dues have been paid by the assessee well before the due date for filing the return of income prescribed for the year under appeal. Further, the learned Members of the hon''ble income tax Appellate Tribunal in their order in I.T.A. No. 557/Luc/2005 for the assessment year 2002-03, dated April 28, 2006, in the appellants own case, have held that ''It has been the consistent stand of the Tribunal, both with regard to employer''s contribution as well as employees'' contribution, that the amendment made in the proviso to section 43B with effect from April 1, 2004, is retrospective in nature and, hence, if the amounts are deposited before the date of filing of return of income then no disallowance can be made''. In the circumstances of the case and the fact that the amounts pertaining to employer''s/employees'' contribution had duly been paid by the assessee much before the due date for submitting the return of income, I have no alternative but to delete the entire disallowance made by the Assessing Officer. Hence, the disallowance is deleted. The appellant shall get relief of Rs. 12,36,139.

10. The present is a case where there is no dispute that payments were made after the due date of the employees'' contribution and the employer''s contribution, but the payment were made well before the due date for filing the return of income prescribed for the year under appeal which is the finding recorded by the Commissioner of income tax.

11. The submission of learned counsel for the Department that the amendments made with effect from April 1, 2004, shall not be retrospective is without any substance and the issue is fully covered by the apex court judgment in Commissioner of Income Tax Kolkata-III Vs. Alom Extrusions Limited, . The apex court in the aforesaid judgment repelling the submission of the department laid down following (page 314):

We find no merit in these civil appeals filed by the Department for the following reasons: firstly, as stated above, section 43B (main section), which stood inserted by the Finance Act, 1983, with effect from April 1, 1984, expressly commences with a non obstante clause, the underlying object being to disallow deductions claimed merely by making a book entry based on the mercantile system of accounting. At the same time, section 43B (main section) made it mandatory for the Department to grant deduction in computing the income u/s 28 in the year in which tax, duty, cess, etc., is actually paid. However, Parliament took cognizance of the fact that the accounting year of a company did not always tally with the due dates under the Provident Funds Act, Municipal Corporation Act (octroi) and other tax laws. Therefore, by way of the first proviso, an incentive/ relaxation was sought to be given in respect of tax, duty, cess or fee by explicitly stating that if such tax, duty, cess or fee is paid before the date of filing of the return under the income tax Act (due date), the assessee(s) then would be entitled to deduction. However, this relaxation/incentive was restricted only to tax, duty, cess and fee. It did not apply to contributions to labour welfare funds. The reason appears to be that the employer(s) should not sit on the collected contributions and deprive the workmen of the rightful benefits under social welfare legislations by delaying payment of contributions to the welfare funds. However, as stated above, the second proviso resulted in implementation problems, which have been mentioned hereinabove, and which resulted in the enactment of the Finance Act, 2003, deleting the second proviso and bringing about uniformity in the first proviso by equating tax, duty, cess, and fee with contributions to welfare funds. Once this uniformity is brought about in the first proviso, then, in our view, the Finance Act, 2003, which is made applicable by Parliament only with effect from April 1, 2004, would become curative in nature, hence, it would apply, retrospectively, with effect from April 1, 1988. Secondly, it may be noted that, in the case of Allied Motors (P.) Ltd. Vs. Commissioner of Income Tax, Delhi, , the scheme of section 43B of the Act came to be examined. In that case, the question which arose for determination was, whether sales tax collected by the assessee and paid after the end of the relevant previous year but within the time allowed under the relevant sales tax law should be disallowed u/s 43B of the Act while computing the business income of the previous year ? That was a case which related to the assessment year 1984-85. The relevant accounting period ended on June 30, 1983. The income tax Officer disallowed the deduction claimed by the assessee which was on account of sales tax collected by the assessee for the last quarter of the relevant accounting year. The deduction was disallowed u/s 43B which, as stated above, was inserted with effect from April 1, 1984. It is also relevant to note that the first proviso which came into force with effect from April 1, 1988, was not on the statute book when the assessments were made in the case of Allied Motors (P.) Ltd. Vs. Commissioner of Income Tax, Delhi, . However, the assessee contended that even though the first proviso came to be inserted with effect from April 1, 1988, it was entitled to the benefit of that proviso because it operated retrospectively from April 1, 1984, when section 43B stood inserted. This is how the question of retrospectivity arose in Allied Motors (P.) Ltd. Vs. Commissioner of Income Tax, Delhi, . This court, in Allied Motors (P.) Ltd. Vs. Commissioner of Income Tax, Delhi, , held that when a proviso is inserted to remedy unintended consequences and to make the section workable, a proviso which supplies an obvious omission in the section and which proviso is required to be read into the section to give the section a reasonable interpretation, it could be read as retrospective in operation, particularly to give effect to the section as a whole. Accordingly, this court, in Allied Motors (P.) Ltd. Vs. Commissioner of Income Tax, Delhi, , held that the first proviso was curative in nature, hence, retrospective in operation with effect from April 1, 1988. It is important to note once again that, by the Finance Act, 2003, not only the second proviso is deleted but even the first proviso is sought to be amended by bringing about uniformity in tax, duty, cess and fee on the one hand, vis-a-vis contributions to welfare funds of employee(s) on the other. This is one more reason why we hold that the Finance Act, 2003, is retrospective in operation. Moreover, the judgment in Allied Motors P. Ltd. (supra) is delivered by a Bench of three learned judges, which is binding on us. Accordingly, we hold that the Finance Act, 2003, will operate retrospectively with effect from April 1, 1988 (when the first proviso stood inserted). Lastly, we may point out the hardship and the invidious discrimination which would be caused to the assessee(s) if the contention of the Department is to be accepted that the Finance Act, 2003, to the above extent, operated prospectively. Take an example--in the present case, the respondents have deposited the contributions with the R.P.F.C. after March, 31 (end of the accounting year) but before filing of the returns under the income tax Act and the date of payment falls after the due date under the Employees'' Provident Funds Act, they will be denied deduction for all times. In view of the second proviso, which stood on the statute book at the relevant time, each of such assessee(s) would not be entitled to deduction u/s 43B of the Act for all times. They would lose the benefit of deduction even in the year of account in which they pay the contributions to the welfare funds, whereas a defaulter, who fails to pay the contribution to the welfare fund right up to April 1, 2004, and who pays the contribution after April 1, 2004, would get the benefit of deduction u/s 43B of the Act. In our view, therefore, the Finance Act, 2003, to the extent indicated above, should be read as retrospective. It would, therefore, operate from April 1, 1988, when the first proviso was introduced. It is true that Parliament has explicitly stated that the Finance Act, 2003, will operate with effect from April 1, 2004. However, the matter before us involves the principle of construction to be placed on the provisions of the Finance Act, 2003.

12. The apex court in the aforesaid judgment has laid down that amendments by the Finance Act, 2003, which were made applicable with effect from April 1, 2004, would become curative in nature hence it would apply retrospectively with effect from April 1, 1988.

13. In view of the above pronouncement of the apex court, the submission raised by learned counsel for the Department cannot be accepted. No other submission has been pressed before us. There is no merit in the appeal and the same is dismissed.