IN THE INCOME TAX APPELLATE TRIBUNAL KOLKATA BENCH "B", KOLKATA

[Before Shri Rajesh Kumar, Accountant Member &
Shri Sonjoy Sarma, Judicial Member]

I.T.A. No. 106/Kol/2022
Assessment Year : 2017-18

Dalmia Laminators Ltd. PAN: AABCD 1748 C	Vs.	ACIT, Circle-7(1), Kolkata
Appellant		Respondent

Date of Hearing	01.08.2023
Date of Pronouncement	25.08.2023
For the Assessee	Shri N.S. Saini, AR & Ms. Priyanka Salarpuria, AR
For the Revenue	Shri P.P. Barman, Addl. CIT, Sr. DR

ORDER

Per Sonjoy Sarma, JM:

This appeal of the assessee for the assessment year 2017-18 is directed against the order dated 08.12.2021 passed by the ld. Commissioner of Income-tax, Appeals, NFAC, Delhi [hereinafter referred to as 'the 'ld. CIT(A)']. The assessee has raised the following grounds of appeal:

> *"i. That the order passed u/s 250 of the ld. CIT(Appeals) confirming the additions and disallowances made by learned assessing officer is contrary to the law and facts of the case.*
>
> *ii. That the ld. CIT(Appeals) erred in law as well as in facts of the case by confirming the addition made by the ld. AO who treated the increase in share capital and premium amounting to Rs. 1,60,00,000/- as undisclosed income u/s 68 of the I.T. Act.*
>
> *iii. That the appellant craves leave to add/or amend any ground of this appeal."*

2. Brief facts of the case are that the ld. AO framed the assessment order u/s 143(3) vide order dated 14.12.2019 for the A.Y. 2017-18 of the Act. The assessee in its return of income disclosing total income of Rs. Nil and book profit of Rs. 5,54,72,136/-. In the order passed u/s 143(3) of the Act, the ld. AO assessed the income of the assessee at

Rs. 16,43,788/- after making an additions/disallowances on account of u/s 36(1)(va) r.w.s. 2(24)(x) of Rs. 13,04,162/- and disallowance by way of penalty or fine for violation of any law of Rs. 3,39,626/-.

3. Aggrieved by the above order, assessee preferred an appeal before the ld. CIT(A) where the appeal of the assessee was dismissed by the sustaining the order of ld. AO.

4. Feeling aggrieved by the above order, assessee is in appeal before the Tribunal raising multiple grounds of appeals. First we take up ground no. 1 which is general in nature need not required to be adjudicated. The 2nd ground of appeal relating to disallowance made u/s 36(1)(va) of the Act in respect of delay in deposit of Employees' Contribution of Provident Fund and Employees State Insurance (PF & ESI) totaling to Rs.13,04,162/-. The issue relating to ground taken by the assessee have come to rest by the recent verdict of the *Hon'ble Supreme Court in Chekmate Services Pvt. Ltd. Vs. CIT (2022) 143 taxmann.com 178 (SC) dated 12.10.2022* wherein it has been held that *"deduction u/s 36(1)(va) in respect of delayed deposit of amount collected towards employees' contribution to PF cannot be claimed when deposited within the due date of filing of return even when read with Section 43B of the Income-tax Act,1961."* Relevant extract of the said judgment is reproduced as under:

> *"• The deduction made by employers to approved provident fund schemes, is the subject matter of Section 36(1) (iv). It is noteworthy, that this provision was part of the original IT Act; it has largely remained unaltered. On the other hand, Section 36(1)(va) was specifically inserted by the Finance Act, 1987, w.e.f. 01-04-1988. Through the same amendment, by Section 3(b), Section 2(24) – which defines various kinds of "income" – inserted clause (x). This is a significant amendment, because Parliament intended that amounts not earned by the assessee, but received by it, - whether in the form of deductions, or otherwise, as*

receipts, were to be treated as income. The inclusion of a class of receipt, i.e., amounts received (or deducted from the employees) were to be part of the employer/assessee's income. Since these amounts were not receipts that belonged to the assessee, but were held by it, as trustees, as it were, Section 36(1)(va) was inserted specifically to ensure that if these receipts were deposited in the EPF/ESI accounts of the employees concerned, they could be treated as deductions. Section 36(1)(va) was hedged with the condition that the amounts/receipts had to be deposited by the employer, with the EPF/ESI, on or before the due date. The last expression "due date" was dealt with in the explanation as the date by which such amounts had to be credited by the employer, in the concerned enactments such as EPF/ESI Acts. Importantly, such a condition (i.e., depositing the amount on or before the due date) has not been enacted in relation to the employer's contribution (i.e., Section 36(1)(iv)).

• The significance of this is that Parliament treated contributions under Section 36(1)(va) from those under Section 36(1)(iv). The latter (hereinafter, "employers' contribution") is described as "sum paid by the assessee as an employer by way of contribution towards a recognized provident fund". However, the phraseology of Section 36(1)(va) differs from Section 36(1)(iv). It enacts that "any sum received by the assessee from any of his employees to which the provisions of sub-clause (x) of clause (24) of section 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." The essential character of an employees' contribution, i.e., that it is part of the employees' income, held in trust by the employer is underlined by the condition that it has to be deposited on or before the due date.

• The differentiation is also evident from the fact that each of these contributions is separately dealt with in different clauses of Section 36 (1). All these establish that Parliament, while introducing Section 36(1)(va) along with Section 2(24)(x), was aware of the distinction between the two types of contributions. There was a statutory classification, under the IT Act, between the two.

• There is no doubt that in Alom Extrusions, this court did consider the impact of deletion of second proviso to Section 43B, which mandated that unless the amount of employers' contribution was deposited with the authorities, the deduction otherwise permissible in law, would not be available. This court was of the opinion that the omission was curative, and that as long as the employer deposited the dues, before filing the return of income tax, the deduction was available. A reading of the judgment in Alom Extrusions, would reveal that this court, did not consider Sections 2(24)(x) and 36(1)(va). Furthermore, the separate provisions in Section 36(1) for employers' contribution and employees' contribution, too went unnoticed.

• When Parliament introduced Section 43B, what was on the statute book, was only employer's contribution (Section 36(1)(iv)). At that point in time, there was no question of employee's contribution being considered as part of the employer's earning. On the application of the original principles of law it could have been treated only as receipts not amounting to income. When Parliament introduced the amendments in

1988-89, inserting Section 36(1)(va) and simultaneously inserting the second proviso of Section 43B, its intention was not to treat the disparate nature of the amounts, similarly. As discussed previously, the memorandum introducing the Finance Bill clearly stated that the provisions – especially second proviso to Section 43B - was introduced to ensure timely payments were made by the employer to the concerned fund (EPF, ESI, etc.) and avoid the mischief of employers retaining amounts for long periods. That Parliament intended to retain the separate character of these two amounts, is evident from the use of different language. Section 2(24)(x) too, deems amount received from the employees (whether the amount is received from the employee or by way of deduction authorized by the statute) as income - it is the character of the amount that is important, i.e., not income earned. Thus, amounts retained by the employer from out of the employee's income by way of deduction etc. were treated as income in the hands of the employer. The significance of this provision is that on the one hand it brought into the fold of "income" amounts that were receipts or deductions from employees income; at the time, payment within the prescribed time – by way of contribution of the employees' share to their credit with the relevant fund is to be treated as deduction (Section 36(1)(va)). The other important feature is that this distinction between the employers' contribution (Section 36(1)(iv)) and employees' contribution required to be deposited by the employer (Section 36(1)(va)) was maintained - and continues to be maintained. On the other hand, Section 43B covers all deductions that are permissible as expenditures, or out-goings forming part of the assessees' liability. These include liabilities such as tax liability, cess duties etc. or interest liability having regard to the terms of the contract. Thus, timely payment of these alone entitle an assessee to the benefit of deduction from the total income. The essential objective of Section 43B is to ensure that if assessees are following the mercantile method of accounting, nevertheless, the deduction of such liabilities, based only on book entries, would not be given. To pass muster, actual payments were a necessary pre-condition for allowing the expenditure.

• The distinction between an employer's contribution which is its primary liability under law – in terms of Section 36(1)(iv), and its liability to deposit amounts received by it or deducted by it (Section 36(1)(va)) is, thus crucial. The former forms part of the employers' income, and the later retains its character as an income (albeit deemed), by virtue of Section 2(24)(x) - unless the conditions spelt by Explanation to Section 36(1)(va) are satisfied i.e., depositing such amount received or deducted from the employee on or before the due date. In other words, there is a marked distinction between the nature and character of the two amounts – the employer's liability is to be paid out of its income whereas the second is deemed an income, by definition, since it is the deduction from the employees' income and held in trust by the employer. This marked distinction has to be borne while interpreting the obligation of every assessee under Section 43B.

• The non-obstante clause in section 43B would not in any manner dilute or override the employer's obligation under section 36(1)(va) to deposit

the amounts retained by it or deducted by it from the employee's income, unless the condition that it is deposited on or before the due date, is correct and justified. The non-obstante clause has to be understood in the context of the entire provision of Section 43B which is to ensure timely payment before the returns are filed, of certain liabilities which are to be borne by the assessee in the form of tax, interest payment and other statutory liability. In the case of these liabilities, what constitutes the due date is defined by the statute. Nevertheless, the assessees are given some leeway in that as long as deposits are made beyond the due date, but before the date of filing the return, the deduction is allowed. That, however, cannot apply in the case of amounts which are held in trust, as it is in the case of employees' contributions- which are deducted from their income. They are not part of the assessee employer's income, nor are they heads of deduction per se in the form of statutory pay out. They are others' income, monies, only deemed to be income, with the object of ensuring that they are paid within the due date specified in the particular law. They have to be deposited in terms of such welfare enactments. It is upon deposit, in terms of those enactments and on or before the due dates mandated by such concerned law, that the amount which is otherwise retained, and deemed an income, is treated as a deduction. Thus, it is an essential condition for the deduction that such amounts are deposited on or before the due date. If such interpretation were to be adopted, the non-obstante clause under Section 43B or anything contained in that provision would not absolve the assessee from its liability to deposit the employee's contribution on or before the due date as a condition for deduction."

3. Respectfully following the decision of Hon'ble Supreme Court (supra) which squarely covers the grounds taken by the assessee, accordingly instant ground is hereby dismissed.

4. Ground no. 3 in the instant appeal relating to sustaining the disallowance of Rs. 3,39,626/- made by the AO u/s 40 of the Act by disallowing the claim of assessee towards payment made by virtue of order of Labour Court which was added by the AO on the disclosure made by the tax auditor in TAR (Form no. 3CD) as the assessee claimed expenditure by way of penalty or fine for

violation of law. The ld. AR submitted before us by stating that Rs. 2,38,000/- was paid towards industrial safety license. The same was for the purpose of carrying on business by the assessee and hence allowable deduction u/s 37 of the Act and Rs. 96,690/- was paid as damages u/s 85-B of ESI Act, 1948. Therefore, the alleged amount is allowable deduction in view of various decisions of Hon'ble Supreme Court in the case of Mahalakshmi Sugar Mills Companies vs CIT (123 ITR 429). This was followed by the Mumbai Bench of ITAT in the case of ITO vs Bisleri (I) (P) Ltd. reported in 12 ITD 116 (Mum). Further, the Hon'ble Supreme Court in the case of Prakash Cotton Mills Pvt. Ltd. vs CIT (201 ITR 684 (SC) has held that imposed of damages paid by the assessee under the Employees State Insurance Act, 1948 for delayed payment of contribution thereunder is allowable deduction u/s 37(1) of the Act. This was followed by the Chandigarh Bench of the Tribunal in the case of DCIT vs M/s. Oswal Woollen Mills Ltd. vide order dated 16.03.2012. Therefore the assessee's claim of Rs. 3,39,626/- is allowable as business expenditure and direction may be issued to delete the addition made by the AO.

5. On the other hand, ld. DR supported the order passed by the ld. CIT(A) by sustaining the addition made by the AO in his order.

6. We after hearing the rival submission of the parties and perusal of the material available on record, we find that although the ld. AR submitted various decisions rendered by various

Tribunals and Hon'ble Courts on this subject matter. However, the assessee could not controvert the fact before us by placing supported documents to prove the payments were made for the purpose of carrying out of the business activity of the assessee. Neither the assessee produce before us, the copy of the judgement rendered by the labour court to prove the fact to show us for what purpose such payments were determined by the labour court. Therefore, the instant ground taken by the assessee cannot be sustained hence the ground taken by the assessee is hereby dismissed.

7. Ground no. 4 & 5 are inter connected and therefore they are adjudicate together. On this issue, ld. AR submitted that while passing the impugned order, the ld. CIT(A) observed in the last para of this order that the original return for impugned Assessment Year 2017-18 was filed on 31.10.2017 which was revised on 23.02.2018 subsequently it was declared as defective by CPC and finally a revised return u/s 139(5) was filed by the assessee on 10.07.2018 which is beyond the due date and therefore it was termed as belated return and hence claim of assessee to carry forward losses are not permitted. The correct facts of the case are that the original return of income was filed on 31.10.2017 u/s 139(1). After it, a notice u/s 139(9) of the Act was received by the assessee to remove the defect in the original return filed on 31.10.2017. In pursuance to such notice, the assessee on 23.02.2018 filed a return removing the defect u/s 139(9) of the Act. Thereafter, the return of assessee was further revised on 10.07.2018 by filing it u/s 139(5) of the Act.

8. The ld. AR submits that when original return filed is defective and the defect is removed u/s 139(9) of the Act, the return filed u/s 139(1) becomes a valid return from the date when it was originally filed. The assessee draws Support from the decision of the Hon'ble Bombay High Court in the case of Atul Projects India Pvt. Ltd -Vs- Union of India and Another reported in (2020) 422 ITR 478 (Bom) where it was held that "it is true that the return was invalid as originally filed because of a defect in the person signing the return. But by virtue of Sec. 139(9) that defect could be cured and was in fact cured. Though the defect was cured on October 15, 1992 it would relate back to December 31, 1991 the date of original filing of the return."

Still further Sec. 80 provides as follows: -

Submission of return for losses.

> *80. Notwithstanding anything contained in this Chapter, no loss which has not been determined in pursuance of a return filed in accordance with the provisions of sub-section (3) of section 139, shall be carried forward and set off under sub-section (1) of section 72 or sub-section (2) of section 73 [or sub-section (2) of section 73A] or sub-section (1) [or sub-section (3)) of section 74 [or sub-section (3) of section 74A].*

9. A bare perusal of the above provision goes to show that a loss sustained during the year by an assessee under the head Business Profits & Gains, Capital Gains shall not be allowed to be carried forward for adjustments against profits or gains of the subsequent assessment year if the return of loss is not filed within the due date u/s 139(1) of the Act. In the case of the assessee the return of income was filed as NIL after adjustment of brought forward business loss of Rs. 2,55,37,104/- of the AY

2015-16. During the course of assessment u/s 143(3) the Assessing Officer made addition under various heads of Rs. 16,43,788/-. The assessee had carried forward business loss of Rs. 5,61,50,519/- for the AY 2015-16 which the assessee requested the Assessing Officer to adjust against the assessed income. During the year the assessee had not suffered any loss carry forward of which was claimed by the assessee. Therefore the disallowance of carried forward business loss of earlier years was wholly unjustified and against the prescribed provision of law.

10. On the other hand, ld. DR supported the decision rendered by the authorities below. We after hearing the rival submission of the parties and perusal of the material available on record, we find that the original return of assessee was filed defective and the defect removed u/s 139(9) of the Act. Therefore, the return filed u/s 139(1) becomes a valid return from the date when it was originally filed. The Hon'ble Bombay High Court in the case of Atul Projects India Pvt. Ltd. vs Union of India and another reported in (2020) 422 ITR 478 (Bom) where it was held that "it is true that the return was invalid as originally filed because of a defect in the person signing the return. But by virtue of section 139(9) that the defect could be cured and was in fact cured. Though the defect was cured on October 15, 1992 it would relate back to December 31, 1991, the date of original filing of the return."

11. In the instant case, the assessee's return of income filed as Nil after adjustment of brought forward loss of Rs. 2,55,37,104/- for A.Y. 2015-16. During the course of assessment, assessing office made an addition under various heads of Rs. 16,43,788/-. Since the assessee had carry forward business loss of Rs. 5,61,50,519/- for the A.Y. 2015-16 which the assessee requested the assessing officer to adjust against the assessee's income as as during the year, assessee had not suffered any loss carry forward for which claimed by the assessee. Therefore, the disallowance of carry forward business loss on earlier years was wholly unjustified and against prescribed provisions of law. In the present case, the claim of the assessee was disallowed by the ld. AO and sustaining the same by the ld. CIT(A) stating that the original return was filed on 31.10.2017 which was revised on 23.02.2018 as defective by CPC and finally revised return u/s 139(5) was filed on 10.07.2018 which is beyond due date and it is establish norm that as per Income Tax Act carry forward losses are permitted when the return was filed in time and in the case of assessee return has been filed late. Therefore, the ld. AO was within the right matrix to disallow carry forward loss in the case of assessee.

12. However, we find that this view taken by the authorities below is not correct since the assessee submitted original return defective and defect was removed u/s 139(9) of the Act, the return filed u/s 139(1) becomes valid return from the date when it was originally filed. Therefore, the view taken by the authorities below is not sustainable and we after following the decision of the

Hon'ble Bombay High Court in the case of Atul Projects India Pvt. Ltd. (supra). We are inclined to allow the ground taken by the assessee and direct the AO to allow set off the business income of Rs. 16,43,788/- with carry forwarded business loss of Rs. 5,61,50,519/- for A.Y. 2015-16 by the assessee. Accordingly, the appeal of the assessee is partly allowed.

13. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open court on 25.08.2023.

Sd/- Sd/-

(Rajesh Kumar) (Sonjoy Sarma)
Accountant Member Judicial Member

Dated: 25.08.2023
Biswajit, Sr. PS

Copy of the order forwarded to:

1. Appellant- Dalmia Laminators Ltd., 130, Cotton Street, Burra Bazar, Kolkata-700007.
2. Respondent – ACIT, Circle-7(1), Kolkata.
3. Ld. CIT
4. Ld. CIT(A)
5. Ld. DR

True Copy By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata