

Sec. 43B applies to both employee and employer's contribution to PF and ES0049

Summary – The High Court of Allahabad in a recent case of Sagun Foundry (P.) Ltd., (the Assessee) held that Assessee deposited contributions towards provident fund and ESI before due date of filing of return, deductions allowable

Facts

- The assessee (employer) deposited contributions of employer and employees towards provident fund and Employees State Insurance (ESI) beyond due date prescribed under the provisions of the Employees State Insurance Act, 1948 [1948 Act] and Employees Provident Funds and Miscellaneous Provisions Act, 1952 [1952 Act], but before the due date of filing of return of income under section 139(1) for the relevant assessment year 2001-02. It claimed deductions in respect of contributions to provident fund and ESI.
- The Assessing Officer disallowed the deductions claimed by the assessee.
- Both the Commissioner (Appeals) and the Tribunal confirmed the order of the Assessing Officer.
- On appeal to High Court:

Held

- Section 36(1)(va) permits deductions in respect to relevant fund of employees.
- Section 43B permits deductions otherwise allowable under the Income-tax Act in case any sum payable by the assessee is paid actually before the date of filing of return under section 139 and carves out an exception in this regard.
- *Explanation* to section 36(1)(va) provides that deduction shall be allowed in respect to the sum paid by the assessee to employee's account, in the relevant fund, on or before due date, *i.e.*, such date by which assessee is required to credit employee's contribution in the relevant fund, under any Act, Rule, Order or Notification issued therein. In the instant case, due date, therefore, shall be the date mentioned in the 1952 Act or 1948 Act or Rules framed thereunder, etc. by which contributions were to be made. Admittedly as per due date under the relevant Acts, contributions were not paid by the assessee. Section 36(1)(va) talks of only employee's contribution and allow deduction in respect thereto in computing 'income' under section 28.
- So far as section 43B is concerned, it was inserted with effect from 1-4-1984 to allow deductions provided payments are actually made before filing of return as per due date under section 139(1). 'Income' defined under section 2(24) includes 'profits and gains'. Under section 2(24)(x), any sum received by assessee from his employees as contribution to any provident fund/superannuation fund or any fund set up under Employees State Insurance Act, 1948, or any other fund for welfare of such employees, constitute 'income'. In respect to such contributions deduction was allowed under

section 36(1)(va) when contributions received by employer is deposited within time prescribed, under relevant labour welfare statute. Prior to 1-4-1984, every assessee was entitled to deduction on mercantile system of accounting as a business expenditure by making provision in his books of account in that regard and this situation continued upto 1-4-1984. An assessee, if maintaining books on accrual system of accounting, even after collecting contribution from his employee, and even without remitting the amount to Regional Provident Fund Commissioner, he would have claimed deduction as 'business expense' by merely making a provision to that effect in his books of account. A similar discrepancy was noticed in the context of sales tax where assessee collected the same and other indirect taxes from his respective customers and claimed deduction only by making provisions in his books without actually remitting the amount to exchequer. To curb this practice, section 43B was inserted with effect from 1-4-1984, whereby mercantile system of accounting with regard to tax, duty and contributions to welfare funds stood discontinued. Now it became necessary for the assessee to account for the aforesaid items, not on mercantile basis, but on cash basis. With effect from 1-4-1988 section 43B was again amended and a Proviso was inserted. It provided, *inter alia*, in the context of any sum payable by the assessee by way of tax, duty, cess or fee, if such an assessee pays such tax, duty, cess or fee even after closing of accounting year but before date of filing of return under section 139(1), assessee would be entitled to deduction under section 43B on actual payment basis and such deduction would be admissible for the accounting year. This proviso, however, was not made applicable to contributions made by the assessee to labour welfare funds. By Finance Act, 1988, with effect from 1-4-1988, Second Proviso came to be inserted. Second Proviso was further amended by Finance Act, 1989 with effect from 1-4-1989.

- From the above provisions, now assessee becomes entitled to deduction only if contribution stand credited on or before due date, given in labour welfare statutes. However, Second Proviso again created certain difficulties. In many of the companies, financial year ended on 31st March did not coincide with accounting period of labour welfare statutes. In many cases, time to make contribution of funds ended after due date of filing of returns. On the representation of industries, again Parliament, vide Finance Act, 2003, with effect from 1-4-2004, made amendment by deleting Second Proviso and amending First Proviso.
- The Supreme Court in the case of *Alom Extrusions Ltd. (supra)* considered the intent, purpose and object in the historical back drop of insertion of section 43B and its progress by way of various amendments and held that when the contribution had been paid by the assessee towards provident fund, etc. prior to filing of return under section 139(1), the assessee would be entitled for deduction under section 43B.
- From the aforesaid judgment of the Supreme Court, the Bench finds that irrespective of the fact that deduction in respect of sum payable by employer's contribution was involved, but the Court did not restrict observations, findings and declaration of law to that context but looking to the objective and purpose of insertion of section 43B applied it to both the contributions, whether by employer or employee. It also observed clearly that section 43B is with a *non obstante* clause and, therefore,

over ride even if, anything otherwise is contained in section 36 or any provision of the Income-tax Act.

- In view of the aforesaid, the assessee was entitled to deductions under sections 43B and 36(1)(va).