IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE THOTTATHIL B.RADHAKRISHNAN
&
THE HONOURABLE MR.JUSTICE K.HARILAL

FRIDAY, THE 27TH DAY OF MARCH 2015/6TH CHAITHRA, 1937

ITR.No. 65 of 1999

AGAINST THE ORDER IN I.T.A. NO. 705/1995 of INCOME TAX APPELLATE TRIBUNAL,COCHIN BENCH, COCHIN.

PETITIONER(S):

THE COMMISSIONER OF INCOME TAX,
COCHIN.

BY ADV. SRI.P.K.R.MENON, SR.COUNSEL,GOI(TAXES)

RESPONDENT(S):

M/S SOUTH INDIA CORPORATION LTD.,
BROADWAY, ERNAKULAM, COHCIN-31.

BY ADV. SRI.B.S.KRISHNAN (SR.)
ADV. SRI.K.ANAND (A.201)

THIS INCOME TAX REFERENCE HAVING BEEN FINALLY HEARD ON 27-03-2015, ALONG WITH ITR. 66/1999, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

THOTTATHIL B. RADHAKRISHNAN &
K. HARILAL, JJ.

I.T.R. Nos.65 & 66 of 1999

Dated this the 27th day of March, 2015

ORDER

Thottathil B. Radhakrishnan, J.

The only question referred by the Income Tax Appellate Tribunal, in these two matters, is as follows:

> "Whether, on the facts and in the circumstances of the case and also in the light of the clear provisions of Explanation to clause (va) of Section 36(1) and Section 43B read with the decision reported in 227 ITR 446 (Hitech (India) Pvt. Ltd., vs. Union of India and others), the assessee is entitled to claim deduction of the belated payment to Provident Fund?"

2. Heard the learned senior counsel appearing on either side.

3. The question arose as a common issue in both the

appeals that related to the deletion of dis-allowance of belated payment of Provident Fund amount. Provident Fund amounting to ₹7,69,632/- relating to the assessment year 1992-93 and ₹7,60,047/- relating to the assessment year 1993-94. The Department took the stand that the assessee is not entitled to the deduction on the ground that the payment has not been made on the due date as defined in the Explanation to clause (va) of sub-section (1) of Section 36 of the Income Tax Act. The CIT Appeals followed the Tribunal decision in I.T.A. Nos.194 (Coch)/92 and 361 (Coch)/94. The Department's contention in the case in hand was left unanswered leaving it open to the Department to make a reference application, though it is submitted that another reference application under Section 256(2) of the Income Tax Act was pending in relation to the issues in the afore-noted case.

4. Going by the material findings of facts, it cannot be disputed that the payments were made by the assessee after the date by which the assessee was required as the employer to credit an employee's contribution to the employees' account in the Provident Fund. Therefore, in terms of the Explanation to clause (va) of Section 36(1) of

the Income Tax Act, such sums paid after the due date cannot be claimed as other deductions in terms of Section 36 of the Income Tax Act. This is pointedly so because in terms of Section 43B of the Income Tax Act, deductions are to be only on actual payment. These two provisions were considered by the Hon'ble Supreme Court of India in Hitech (India) Pvt. Ltd., vs. Union of India and others (1997 Volume 227 ITR 446) in which it was held that a combined reading of clause (va) of Section 36(1) and Section 43B of the Income Tax Act makes it clear that if the assessee (employer) credited any sum received by him from any of his employees on or before the due date, that is, the date by which the assessee (employer) is required to credit the employees' contribution to the employees' account in the relevant fund (including the Provident Fund), he will be entitled to deduct the said amount in computing his business income. But, Section 43B controls the allowability of deduction of payment specified in clauses (a) to (d) thereof and provides certain conditions subject to which alone the deductions may be permissible. Enunciating the point, it was held that deduction would be available only if the remittance to the fund is made within the due date fixed for making such remittance into the fund; in the case in hand, the Provident Fund. So much so, the question referred is to be answered in favour of the Revenue. Hence we answer the reference by holding that on the facts and in the circumstances of the case, the assessee is not entitled to claim deduction of the belated payment to the Provident Fund in view of the provisions of the Explanation to clause (va) of Sections 36(1) and 43B of the Income Tax Act, in the light of the law laid in Hitech (India) Pvt. Ltd., vs. Union of India and others (1997 Volume 227 ITR 446).

References are answered accordingly.

Sd/-

(**THOTTATHIL B. RADHAKRISHNAN, JUDGE)**

Sd/-

(K. HARILAL, JUDGE)

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P.S. to Judge