

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE ANTONY DOMINIC  
&  
THE HONOURABLE MR. JUSTICE SHAJI P. CHALY

TUESDAY, THE 8TH DAY OF SEPTEMBER 2015/17TH BHADRA, 1937

ITA.No. 244 of 2014 ()  
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AGAINST THE ORDER IN ITA 8/2014 of I.T.A. TRIBUNAL, COCHIN BENCH DATED 09-05-2014

APPELLANT/APPELLANT/RESPONDENT/REVENUE:  
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THE COMMISSIONER OF INCOME TAX,  
COCHIN.

BY ADVS. SRI. P. K. R. MENON, SR. COUNSEL, GOI (TAXES)  
SRI. JOSE JOSEPH, SC, FOR INCOME TAX

RESPONDENT/RESPONDENT/APPELLANT/ASSESSEE:  
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M/S MERCHEM LIMITED,  
MALANKARA CENTRE, M.G. ROAD, KOCHI 682 035.

BY ADVS. SRI. SAJI VARGHESE  
SMT. MARIAM MATHAI

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON 11-08-2015, THE  
COURT ON 08.09.2015 DELIVERED THE FOLLOWING:

P.T.O.

I.T.A.NO244 OF 2014

APPENDIX

APPELLANT'S ANNEXURES:

- |            |                                                                                                             |
|------------|-------------------------------------------------------------------------------------------------------------|
| ANNEXURE-A | COPY OF THE ASSESSMENT ORDER U/S.143(3) DATED 25.02.2013<br>PASSED BY THE ASSESSING OFFICER FOR AY 2010-11. |
| ANNEXURE-B | COPY OF THE CIT(A)'S ORDER NO.ITA/49/R-I/E/CIT-II/2012-13 DATED<br>23.10.2013.                              |
| ANNEXURE-C | COPY OF THE ITAT'S ORDER ITA NO.8/COCH/2014 DATED<br>09.05.2014 FOR ASSESSMENT YEAR 2010-11.                |
| ANNEXURE-D | TRUE COPY OF THE GUJARAT HIGH COURT JUDGMENT<br>REPORTED IN (2014) 41 (TAXMAN)100.                          |

RESPONDENT'S ANNEXURES: NIL

//TRUE COPY//

P.S. TO JUDGE

St/-

**C.R.**

**ANTONY DOMINIC  
&  
SHAJI P. CHALY, JJ.**

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**I.T.A. No.244 of 2014**  
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**Dated this the 8<sup>th</sup> day of September, 2015**

**JUDGMENT**

**Shaji P. Chaly, J.**

This appeal is preferred by the Revenue against the order of the Income Tax Appellate Tribunal, Cochin Bench in I.T.A. No.8/2014 dated 09.05.2014 for the assessment year 2010-11, by which the Tribunal has affirmed the order of the C.I.T (Appeals) and deleted an amount of Rs.34,41,659/- added by the Assessing Officer under Sec.36(1)(va) r/w Sec.2(24)(x).

2. Brief facts necessary for the disposal of this appeal are as follows:

Respondent was engaged in the business of manufacture and sale of Rubber Chemicals. It had filed return of income for the assessment year 2010-11, disclosing an income of Rs.9,92,16,240/-. The return was processed under Sec.143(1) of the Income Tax Act and scrutiny was conducted under Sec.143(2) on 29.08.2011. It was found by the Assessing Officer that remittance of employees' contribution to Provident

Fund and ESI has been delayed beyond the due date of payment prescribed under the respective Acts and therefore the cumulative figure of all defaulted payments amounting to Rs.34,41,659/- was proposed to be disallowed under Sec.36(1)(va) r/w Sec.2(24)(x) of the Income Tax Act, 1961 (for short, "the Act"). Thereupon, objections were invited and overruling the objections raised, Assessing Officer disallowed deduction of the aforesaid amounts under Sec.36(1)(va) r/w Sec.2(24)(x) of the Income Tax Act.

3. Aggrieved by the order of the Assessing Officer, Respondent took up the matter before the Appellate Authority, basically contending that the Assessing Officer was not justified in disallowing the expenditure of employees' contribution invoking provisions of Sec.36(1)(va). It was further contended that the ratio of the decision of the Hon'ble Apex Court in the case of '**C.I.T. v. Alom Extrusions Ltd.**' [(2009) 319 ITR 306 (SC)] was not followed by the Assessing Officer. After evaluating the facts and circumstances, following the decision of the Hon'ble Apex Court in '**C.I.T. v. Vinay Cement Ltd.**' [(2007) 213 CTR SC 268], the first appellate authority held that contribution towards Provident

Fund and ESI were made before the due date of filing of return and therefore the same are entitled for deduction under Sec.43B of the Income Tax Act. Therefore the addition made by the Assessing Officer in that regard was deleted.

4. Aggrieved by the order of the 1<sup>st</sup> Appellate Authority, Revenue preferred appeal before the Tribunal. Tribunal affirmed the order of the 1<sup>st</sup> Appellate Authority and held that the date of remittance of the contribution was within the due date for filing the return of income under Sec.139(1) of the Act for the assessment year under consideration. It was further held that admittedly, the second proviso to Sec.43B was deleted and the entire sub-clauses under Sec.43B were brought under Explanation (1) to Sec.43B and therefore all payments including employee's and employer's contribution to Provident Fund and ESI paid on or before the due date for filing the return of income under Sec.139(1) has to be deducted while computing the taxable income. It was aggrieved by the order of the Tribunal, Revenue has preferred this appeal. The following questions of law were raised for consideration:

*"1. (a) Whether, on the facts and in the circumstances of the case, the assessee whose contribution towards PF/ESI is not in consonance with the provisions of the Explanation to section 36(1)(va) is entitled to claim deduction of the same under Sec.43B of the Income Tax Act?*

*(b) If the answer to the above question is in the negative cannot the Revenue treat the amount as income under Section 2(24)(x) of the Income Tax Act?*

*2. Is not the order of the Tribunal on the issue wrong and lacks perspective for non consideration of the issue under Section 36(1)(va) read with Section 2 (24)(x) of the Income tax Act?."*

5. Heard the learned Senior Counsel for Revenue and the learned counsel for the assessee.

6. The learned Senior Counsel for the Revenue contended that the finding of the Tribunal that the Respondent was entitled to claim deduction under Sec.43B of the Income Tax Act was not correct in view of Sec.36(1)(va) and Explanation 1 thereto, r/w Sec.2(24)(x), since a specific provision is made for treating the employees contribution towards PF, ESI etc. etc. The learned Senior Counsel has further contended that the Respondent had not credited the sum received towards the employees contribution to the employees' account in the relevant fund on or before the due

date prescribed under Explanation to Sec.36(1)(va) and therefore the Respondent shall not be entitled to deduction as such, though they deposited the amount before the due date prescribed under Sec.43B, i.e. before filing of return under Sec.139(1). It was his further contention that the decision of the Hon'ble Apex Court in '**Vinay Cement Ltd.**' case (*supra*) relied on by the Tribunal was not applicable to the facts of this case, since the Hon'ble Apex Court considered therein only the question of Sec.43B of the Act which deals with contribution payable by the employer. The learned Senior Counsel, on the other hand, relied on the principles laid down by the Gujarat High Court in '**Commissioner of Income-Tax v. Gujarat State Road Transport Corporation**' [(2014) 366 ITR 170 (Guj)].

7. Learned Senior Counsel for the Revenue has invited our attention to paragraph 7 of the judgment in '**Gujarat State Road Transport Corporation's case**' (*supra*) and contended that the issue involved therein was with respect to the employees contribution to Provident Fund Account, ESI etc. etc. as provided under Sec.36(1)(va) and Explanation 1 of the Act. The learned Senior Counsel contended that the provisions

with respect to the employees contribution and the employer's contribution to the PF, ESI etc. were governed by different provisions and need not be mixed up with the other. According to the learned counsel, with respect to the employer's contribution, Sec.43B of the Act would be applicable, however with respect to the employees' contribution, Sec.36(1)(va) and Explanation 1 r/w Sec.2(24) (x) of the Act would be applicable and further that aforesaid provisions are different and distinct and were governing different situations with respect to contributions referred supra on account of employer and employee respectively. Therefore, the learned Senior Counsel contended that Sec.43B cannot be made applicable under any circumstances to a situation with respect to Sec.36(1)(va) of the Income Tax Act and in that view of the matter, findings of the Appellate Tribunal that the Respondent was entitled to get deduction for the employee's contribution as provided under Sec.43B of the Act could not be sustained.

8. It was also contended that in so far as the decision of the Hon'ble Apex Court in '**C.I.T. v. Alom Extrusions Ltd.**' [(2009) 319 ITR 306 (SC)] was concerned, the issues involved

therein were with respect to the employer's contribution to the PF Account under Sec.43B, and whether the amendment brought to Sec.43B as per the Finance Act, 2003 with effect from 01.04.2004 was curative or amendatory and whether it was retrospective or prospective in operation. Therefore, learned Senior Counsel contended that the proposition of law laid down in the said judgment could not be taken to have arrived at a conclusion with regard to the payment of employee's contribution which was provided under Sec.36(1)(va) of the Act. It was also contended that the judgment of the Gujarat High Court cited supra has taken into account the judgment of the Apex Court in '**Alom Extrusions case**' (supra) and found that so far as the employee's contribution was concerned, Sec.36(1)(va) r/w Explanation-1 alone was applicable and Sec.43B of the Act had no role to play at all.

9. The learned Senior Counsel for the Revenue has specifically invited our attention to paragraph 7.06 of the judgment in '**Gujarat State Road Transport Corporation's case**' which read thus:

*"7.06. Considering the aforesaid provisions of the Act, as per section 2(24)(x), any sum received by the assessee from his employees as contribution to any*

*provident fund or superannuation fund or any fund set up under the provisions of the ESI Act or any other fund for the welfare of such employees shall be treated as an "income". Section 36 of the Act deals with the deductions in computing the income referred to in section 28 and as per section 36(1)(va) such 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, the assessee shall be entitled to deduction of such amount in computing the income referred to in section 28 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", i.e. date by which the assessee is required as an employer to credit the employee's contribution to the employee's account in the relevant fund, in the present case, the provident fund and the ESI Fund under the Provident Funds Act and the ESI Act. Section 43B is with respect to certain deductions only on actual payment. It provides that notwithstanding anything contained in any other provisions of the Act, a deduction otherwise liable under the Act in respect of ...(B) any sum payable by the assessee as an employer by way of contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of the employees in computing the income referred to in section 28 of that previous year in which such sum is actually paid by him. It appears that prior to the amendment of section 43B of the Act, vide the Finance Act, 2003, an assessee was entitled to deductions with respect to the sum paid by the assessee as an employer by way of*

*contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of the employees (employer's contribution) provided such sum--employer's contribution is actually paid by the assessee on or before the due date applicable in his case for furnishing 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 and the evidence of such payment is furnished by the assessee along with such return. It also further provided that no deduction shall, in respect of any sum referred to in clause (B), i.e., with respect to the employer's contribution, be allowed unless such sum is actually been paid in cash or by issue of 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 sum has been made otherwise than in cash, the sum has been realised within 15 days from the due date. By the Finance Act, 2003, the second proviso to section 43B of the Act has been deleted and the first proviso to section 43B has also been amended which is reproduced herein above. Therefore, with respect to the employer's contribution as mentioned in clause (b) of section 43B, if any sum towards the employer's contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of the employees is actually paid by the assessee on or before the due date applicable in his case for furnishing the return of the income under sub-section (1) of section 139, the assessee would be entitled to deduction under Sec.43B*

*on actual payment and such deduction would be admissible for the accounting year. However, it is required to be noted that as such there is no corresponding amendment in section 36(1)(va). Deletion of the second proviso to section 43B, vide the Finance Act, 2003, would be with respect to section 43B and with respect to any sum mentioned in section 43B(a) to (f) and in the present case, the employer's contribution as mentioned in section 43B(b). Therefore, the deletion of the second proviso to section 43B and the amendment in the first proviso to section 43B by the Finance Act, 2008 is required to be confined to Section 43B alone and the deletion of the second proviso to section 43B, vide the amendment pursuant to the Finance Act, 2003, cannot be made applicable with respect to section 36(1)(va) of the Act. Therefore, any sum with respect to the employees' contribution as mentioned in section 36(1)(va), the assessee shall be entitled to the deduction of such sum towards the employees' contribution if the same is deposited in the accounts of the concerned employees and in the concerned fund such as provident fund, ESI contribution fund, etc., provided the said sum is credited by the assessee to the employees' accounts in the relevant fund or funds on or before the "due date" under the Provident Funds Act, ESI Act, rule, order or notification issued thereunder or under any standing order, award, contract or service or otherwise. It is required to be noted that as such there is no amendment in section 36(1)(va) and even the Explanation to section 36(1)(va) is not deleted and is*

*still on the statute and is required to be complied with. Merely because with respect to the employer's contribution the second proviso to section 43B which provided that even with respect to the employer's contribution (section 43B(b)), the assessee was required to credit the amount in the relevant fund under the PF Act or any other fund for the welfare of the employees on or before the due date under the relevant Act, is deleted, it cannot be said that section 36(1)(va) is also amended and/or the Explanation to section 36(1)(va) has been deleted and/or amended.*

*It is also required to be noted at this stage that as per the definition of "income" as per section 2(24) (x), any sum received by the assessee from his employees as contribution to any provident fund or superannuation fund or any fund set up under the provisions of the ESI Act or any other fund for the welfare of the such employees is to be treated as income and on fulfilling the condition as mentioned under section 36(1)(va), the assessee shall be entitled to deduction with respect to such employees' contribution. Section 2(24)(x) refers to any sum received by the assessee from his employees as contribution and does not refer to the employer's contribution. Under the circumstances and so long as and with respect to 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 applies, the assessee shall not be entitled to deduction of such sum in computing the income referred to in section 28 unless and until such sum is credited by the assessee*

*to the employees' account in the relevant fund or funds on or before the due date as mentioned in the Explanation to section 36(1)(va). Therefore, with respect to the employees contribution received by the assessee if the assessee has not credited the said sum to the employees' account in the relevant fund or funds on or before the due date mentioned in the Explanation to section 36(1)(va), the assessee shall not be entitled to deductions of such amount in computing the income referred to in section 28 of the Act."*

10. It was further contended that, on a reading of the above extracted portion of the judgment of the Gujarat High Court, it was clear that so far as the amount recovered by assessee towards contribution of the employees to the Provident Fund and ESI are concerned, Sec.36(1)(va) was applicable and if the contributions are not paid within the period specified under the relevant statute as provided under Explanation-1 thereto, the assessee would not be entitled to deduction. It was also contended that there was no amendment made to Sec.36(1)(va) and the Explanation to Sec.36(1)(va) was not deleted and was still on the statute book and therefore the same was required to be complied with, and further that merely the second proviso to Sec.43B which provided that the assessee was entitled to credit the

employer's contribution under Sec.43B(b) in the relevant fund for the welfare of the employees on or before the due date under the relevant Act, was deleted, it cannot be said that Sec.36(1)(va) was also amended and/Explanation to Sec.36(1)(va) has been deleted/or amended.

11. Learned Senior Counsel for the Revenue has also invited our attention to the decisions reported in **'Commissioner of Income-Tax v. South India Corporation Ltd.** [(2000) 242 ITR 114], **'Commissioner of Income-Tax v. G.T.N. Textiles Ltd.'** [(2004) 269 ITR 282], **'Commissioner of Income-Tax v. Jairam and Sons'** [(2004) 269 ITR 285] and contended that the said question was considered by this Court and held that so far as the contribution received from the employees were concerned, Sec.36(1)(va) and the Explanation thereto was the applicable provision and the amounts received towards employees contribution shall be credited to the relevant account of the employee within the due date prescribed under the PF and ESI Acts.

12. Even though the assessment years considered in those judgments were before the Finance Act, 2003 was

introduced, these judgments have clearly drawn a distinction between Sec.36(1)(va) and Sec.43B of the Act. In '**South India Corporation Ltd.** case' (supra), at page 118 held as follows:

*"Learned counsel for the assessee submitted that if payment is permissible to be made with damages after a prescribed period, the same is not unauthorised payment and in view of the broad language employed in clause (va) of sub-section (1) of section 36, it shall be deemed as if the payment was made within the due date. The expression "due date" means the time stipulated for payment. As per the Explanation to clause (va) for the purpose of the clause, "due date" means the date by which the assessee is required as an employer to credit an employee's contribution to the employee's account in the relevant fund. The amount is deductible only if the assessee credits the amount to the employee's account in the relevant fund on or before the date by which he is legally or contractually required to do so. The right to deduction would be lost even if the sum is credited after the due date. It cannot be an indefinite date left to the choice of the assessee. It is to be noted that under the main provision of section 43B of the Act, the payments made during the currency of the financial year relevant to the assessment year qualify for deduction in certain cases. But in the case of payments relating to provident fund, etc. stress has been made on payment within the "due date". Therefore, it cannot be said that payment made*

*beyond the due date also qualifies for deduction, in view of the prescription in the main provision itself. Had that been the legislative intent, there was no necessity to enact the proviso. The Legislature in its wisdom has incorporated the proviso and it cannot be said to be without a purpose. There is nothing repugnant between the main provision and the proviso. They operate in different situations. The view of the Tribunal that payment having been made before the close of the financial year, qualifies for deduction is indefensible.”*

13. On the contrary learned counsel for the Respondent contended that the Respondent was paying the salary and wages during the second week of every month and in the case of contribution towards PF and ESI, the amount would become due for payment within 15 days plus 5 days towards grace period from the end of the month in which wages or salary were paid. Thus, for the Respondent, due dates for the payment of such contribution arose in the month subsequent to the month in which wages/salary actually disbursed and therefore the liability to deduct employees' contribution arises only on paying salary to employees and not as and when wages and salaries are earned by the employees. It was further contended by the learned counsel that the Respondent

can claim deduction under the head subject to the condition that the outstanding statutory payments as shown in the balance as at the end of the relevant previous year were made within the time permitted under Sec.139(1) as prescribed under Sec.43B of the Income Tax Act.

14. Learned counsel for the Respondent, further contended that since Sec.43B takes in both employee's as well as employer's contribution, even if statutory deductions are made by the Respondent during the relevant deduction period, the Respondent was entitled to get deduction, if the same was tendered to the statutory authority before filing of the return under Sec.139(1) of the Act.

15. Learned counsel for the Respondent has also contended that if the shortfall on the Provident Fund or ESI Fund was deposited or made good before the filing of the return, the assessee shall be entitled to deduction under Sec.36(1)(va) in the same year. It was further contended by the learned counsel for the assessee that consequent to the deletion of the second proviso to Sec.43B of the Act with effect from 01.04.2004 by the Finance Act, 2003, which stipulated that contributions to the Provident Fund and ESI should be

made within the time mentioned under Sec.36(1)(va), was retrospective from 01.04.1989 as held in '**Alom Extrusions**' (supra) and that the PF and ESI contribution received from the employees were remitted before the due date for filing of return under Sec.139 of the Income Tax Act, there shall not be any dis-allowance of the contribution so made. Learned counsel also contended that, the payments due under the aforesaid Acts were made by the assessee on or before the due date for the filing of the return and therefore they shall be entitled to deduction in the same year as rightly held by the Appellate Tribunal. In that context, learned counsel has invited our attention to the decision of the Hon'ble Apex Court in '**Alom Extrusions Ltd.**' (supra) and contended that since the Apex Court held that the Finance Act, 2003 will operate retrospectively with effect from 01.04.1988 when the first proviso stood inserted, the Respondent was entitled to get deduction for the contributions of the employees received since the same were paid before the filing of the return under Sec.139(1) of the Act. Learned counsel has invited our attention to paragraph 10 of the judgment and contended that even though in the decision cited supra, the Hon'ble Apex

Court was considering the question of retrospective operation of the amendment so made to Sec.43B as per the Finance Act, 2003, the Court considered the said question after appreciating the entire scheme of the Act, as it existed prior to 01.04.1984 and therefore the application of Sec.43B read with Sec.36(1) (va) was considered by the Apex Court and in such circumstances the findings rendered thereunder is a binding precedent so far as the question considered in this case was concerned.

16. Learned counsel has also invited our attention to '**Commissioner of Income Tax v. AIMIL Ltd. & Ors.**' [(2010) 321 ITR 508 (Del.)], '**Commissioner of Income-Tax v. State Bank of Bikaner & Jaipur**' [(2014) 363 ITR 70 (Rajasthan)], **Essae Teraoka (P) Ltd. v. Deputy Commissioner of Income Tax**' [(2014) 366 ITR 408 (Karn.)], '**Commissioner of Income-Tax v. South India Corporation Ltd.**' [(2000) 242 ITR 114 (Ker.)], '**Commissioner of Income Tax v. Ghatge Patil Transports Ltd.**' [(2014) 368 ITR 749 (Bom)] and '**Commissioner of Income Tax v. Spectrum Consultants India P. Ltd.**' [(2014) 2 ITR-OL 622 (Karn)] and canvassed the proposition

that if the employees contribution received by the assessee was paid actually before the filing of the return under Sec.139 (1), the same could not be disallowed under Sec.43B or Sec.36 (1)(va).

17. In order to answer the questions of law raised in this appeal, we think it appropriate that Sec.36(1)(va) Explanation 1 and Sec.43B and sub-section (b) are extracted.

*"36. Other deductions.--(1) The deductions provided for in the following clauses shall be allowed in respect of the matters dealt with therein, in computing the income referred to in section 28--*

|   |   |   |   |   |   |   |
|---|---|---|---|---|---|---|
| x | x | x | x | x | x | x |
| x | x | x | x | x | x | x |

*(va) 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:*

*Explanation.-- For the purposes of this clause, "due date" means the date by which the assessee is required as an employer to credit an employee's contribution to the employee's account in the relevant fund under any Act, rule, order or notification issued thereunder or under any standing order, award, contract of service or otherwise;"*

*"43B. Certain deductions to be only on actual payment.-- Notwithstanding anything contained in any other provision of this Act, a deduction otherwise allowable under this Act in respect of--*

|   |   |   |   |   |   |
|---|---|---|---|---|---|
| x | x | x | x | x | x |
|---|---|---|---|---|---|

*(b) any sum payable by the assessee as an employer by way of contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of the employees, or*

|   |   |   |   |   |   |
|---|---|---|---|---|---|
| x | x | x | x | x | x |
| x | x | x | x | x | x |

*shall be allowed (irrespective of the previous year in which the liability to pay such sum was incurred by the assessee according to the method of accounting regularly employed by him) only in computing the income referred to in section 28 of that previous year in which such sum is actually paid by him:*

*Provided that nothing contained in this section shall apply in relation to any sum 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."*

18. On a reading of Sec.36(1)(va), what we find is that any sum received by the assessee from his employees to which the provisions of sub-clause (x) of clause (24) of Sec.2 apply was credited by the assessee to the employees' Account in the relevant Fund or Funds on or before the due date prescribed under Explanation 1 to Sec.36(1)(va), is entitled to deduction. According to us, it thus means that Sec.36(1)(va) takes care of contribution received on account of the employees and

credited by the assessee to the employees' account in the relevant Fund or Funds on or before the due date as provided under the relevant statute alone will be entitled to get deduction. In this context, the definition of income contained under Sec.2(24) (x) is relevant, which read thus:

*"any sum received by the assessee from his employees as contributions to any provident fund or superannuation fund or any fund set up under the provisions of the Employees' State Insurance Act, 1948 (34 of 1948), or any other fund for the welfare of such employees."*

19. Therefore, income of the assessee includes any sum received by the assessee from his employee as contribution to any Provident Fund or superannuation fund or funds set up under the provisions of the Employees' State Insurance Act, 1948 (34 of 1948) or any other fund for the welfare of such employees. According to us, on a reading of Sec.36(1)(va) along with Sec.2(24)(x), it is categoric and clear that the contribution received by the assessee from the employee alone was treated as income for the purpose of Sec.36(1)(va) of the Act and therefore we are of the considered opinion that the assessee was entitled to get deduction for the sum received by the assessee from his employees towards contribution to the

fund or funds so mentioned only if, the said amount was credited by the assessee on or before the due date to the employees account in the relevant fund as provided under Explanation 1 to Sec.36(1)(va) of the Act. According to us, so far as Sec.43B (b) is concerned, it takes care of only the contribution payable by the employer/assessee to the respective fund. Therefore, in that circumstances, Sec.36(1) (va) and Sec.43B(b) operate in different fields i.e. the former takes care of employee's contribution and the latter employer's contribution. The assessee was entitled to get the benefit of deduction under Sec.43B(b) as provided under the proviso thereto only with regard to the portion of the amount paid by the employer to the contributory fund. Such an understanding of Sec.43B is further exemplified by the phraseology used in the proviso, which reads thus:

*"Provided that nothing contained in this section shall apply in relation to any sum 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."*

Further, in Explanation 1 to Sec.43B also, the phraseology used persuade us to think that Sec.43B can be applied to the contribution payable by the assessee as an employer, which reads thus:

" x x x x x x x x

*For the removal of doubts, it is hereby declared that where a deduction in respect of any sum referred to in clause (a) or clause (b) of this section is allowed in computing the income referred to in section 28 of the previous year (being a previous year relevant to the assessment year commencing on the 1<sup>st</sup> day of April, 1983 or any earlier assessment year) in which the liability to pay such sum was incurred by the assessee, the assessee shall not be entitled to any deduction under this section in respect of **such sum** in computing the income of the previous year in which the sum is actually paid by him."*

Therefore, according to us, since the Respondent has admittedly not paid the deduction so made within the due date as provided under Sec.36(1)(va), the Respondent was not entitled to get deduction of the amounts deducted thereunder for and on behalf of the employees.

20. In view of the reliance placed by various High Courts in '**Alom Extrusions**' (*supra*), to arrive at a conclusion that the assessees therein were liable to pay both the

employees as well as employer's contribution on or before filing of return under Sec.139(1) only, we thought that if '**Alom Extrusions**' (*supra*) is discussed in detail, the question raised in this case can be made clear. In paragraph 3 of the said judgment, the question considered was formulated as follows::

"3. A short question which arises for determination in this batch of civil appeals is whether omission (deletion) of the second proviso to section 43B of the Income-tax Act, 1961, by the Finance Act, 2003, operated with effect from 1<sup>st</sup> April, 2004, or whether it operated retrospectively with effect from 1<sup>st</sup> April, 1988?".

21. Therefore, the question that was considered in '**Alom Extrusions' case**' was whether omission of second proviso to Sec.43B of the Income Tax Act by the Finance Act, 2003, operated with effect from 1<sup>st</sup> April, 2004 or retrospectively with effect from 1<sup>st</sup> April, 1988. Therefore, the question raised in this appeal has nothing to do with the question considered in the said decision. It is true that Sec.2 (24)(x) as well as Sec.36(1)(va) were discussed in paragraphs 10 and 11 of the said judgment. But it was for the sole purpose of understanding the scheme of the Income Tax Act,

1961 as it existed prior to 1<sup>st</sup> April, 1984 and as it stood after 1<sup>st</sup> April, 1984. After discussing the aforesaid provisions and Sec.43B, the Apex Court held in paragraph 14 of the judgment as follows:

*"14. On reading the above provisions, it becomes clear that the assessee(s)-employer(s) would be entitled to deduction only if the contribution stands credited on or before the due date given in the Provident Fund Act. However, the second proviso once again created further difficulties. In many of the companies, financial year ended on 31<sup>st</sup> March, which did not coincide with the accounting period of R.P.F.C. For example, in many case, the time to make contribution to R.P.F.C. ended after due date for filing of returns. Therefore, the industry once again made representation to the Ministry of Finance and, taking cognizance of this difficulty, the Parliament inserted one more amendment vide Finance Act, 2003, which, as stated above, came into force w.e.f. 1<sup>st</sup> April, 2004. In other words, after 1<sup>st</sup> April, 2004, two changes were made, namely, deletion of the second proviso and further amendment in the first proviso, quoted above. By the Finance Act, 2003, the amendment made in the first proviso equated in terms of the benefit of deduction of tax, duty, cess and fee on the one hand with contributions to employees; provident fund, superannuation fund and other welfare funds on the other. However, the Finance Act, 2003, bringing about this uniformity came into force w.e.f. 1<sup>st</sup> April, 2004.*

|   |   |   |     |   |   |   |   |   |   |
|---|---|---|-----|---|---|---|---|---|---|
|   |   | x | x   | x | x |   |   |   |   |
| x | x | x | x   | x | x | x | x | x | x |
|   |   | x | x'' |   |   |   |   |   |   |

22. Therefore, on a reading of the afore-extracted portion of the judgment, it is clear that the Apex Court had considered only the question relating to the effect of the amendment so made and found that amendment was curative in nature and therefore that it operated retrospectively from 1<sup>st</sup> April, 1988.

23. Thereafter, in paragraph 15 of the judgment, it was held that the amendments were brought about under the Finance Act, 1983 for the purpose of ensuring that the relaxation/incentive was restricted only to tax, duty, cess and fee under Sec.43B in order to ensure that it did not apply to contributions to labour welfare funds. Further, it was held that the reason appears to be that the employers 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. It was also held that consequent to the implementation problems of the second proviso to Sec.43B resulted in enactment of 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 and therefore the Finance Act, 2003 which was made applicable by the Parliament only with effect from 1<sup>st</sup> April, 2004 would become curative in nature and hence it would apply retrospectively from April, 1988.

24. So also, the learned counsel for the assessee contented that since Sec.43B commences with a non-obstante clause, Explanation 1 to Sec.36(1)(va) was excluded. But in ***Alom Extrusions' case'*** (supra), the Apex Court had held that the underlying object of the non-obstante clause was to disallow deductions claimed merely by making the book entry under mercantile system of accounting. Therefore, the contention of the learned counsel for the assessee that since Sec.43B commences with a non-obstante clause, Sec.36(1)(va) stood excluded, cannot be sustained. According to us, the findings of the Apex Court towards the latter part of paragraph 15 makes the intention and purpose behind the amendment brought about to Sec.43B clear and it reads thus:

"15. x x x x x x x  
x x x x x x x

*Accordingly, we hold that Finance Act, 2003, will*

*operate retrospectively w.e.f. 1<sup>st</sup> April, 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 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 31<sup>st</sup> March (end of accounting year) but before filing of the Returns under the IT Act and the date of payment falls after the due date under the Employees' Provident Fund 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 under Sec.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 1<sup>st</sup> April, 2004, and who pays the contribution after 1<sup>st</sup> April, 2004, would get the benefit of deduction under Sec.43B of the Act."*

According to us, it is thus clear that the decision rendered by the Apex Court in '**Alom Extrusions**' (supra) did not consider the question involved in this case.

25. So also, in paragraph 16 of the judgment supra, the Apex Court had quoted with approval the judgment in '**Commissioner of Income Tax v. J.H. Gotla**' [(1985) 156

ITR 323 (SC)], which read thus:

*"We should find out the intention from the language used by the legislature and if strict literal construction leads to an absurd result, i.e. a result not intended to be subserved by the object of the legislation found in the manner indicated before, then if another construction is possible apart from strict literal construction, then that construction should be preferred to the strict literal construction. Though equity and taxation are often strangers, attempts should be made that these do not remain always so and if a construction results in equity rather than in injustice, then such construction should be preferred to the literal construction."*

26. Therefore, in our view, when Sec.43B as it stood prior to the amendment and Sec.36(1)(va) Explanation 1 thereto r/w Sec.2(24)(x) are considered together, it is clear that they operate in different fields. So far as the employee's contribution received is concerned, it should have been paid on or before the due date prescribed under the relevant statutes. Then again the learned counsel contended that on a reading of Sec.43B(b), any sum "payable by the assessee as an employer" by way of contribution to any provident fund meant payment of both employees contribution and employer's contribution, by the employer and therefore the assessee was

entitled to pay both contributions together on or before the filing of the return under Sec.139(1) of the Act. We are unable to accept the said contention advanced by the learned counsel. If such a contention is accepted, that would make Sec.36(1)(va) and the Explanation thereto otiose. According to us, there was no indication in Sec.43B as it stood prior to the amendment and thereafter also to deface Sec.36(1)(va) and the Explanation thereto from the Income Tax Act. Thus, it means that both provisions are operative and the contributions have to be paid in accordance with the mandate contained under Sec.36(1)(va) and Explanation thereto and under Sec. 43B, respectively.

27. So far as the decisions cited by the learned counsel for the assessee referred to in paragraph 15 of this judgment were concerned, it is true that in the said judgments, the High Courts were considering the question of remittance of the contributions received from the employee as well as the employer and held that the contributions received from the employee were also liable to be paid to the respective statutory authorities under the PF and ESI Act on or before the filing of return under Sec.139(1) was alone sufficient to be

eligible for deduction. For the reasons stated, we are unable to subscribe to the views expressed by the High Courts in the decisions cited *supra* by the learned counsel for the assessee. That apart, we are reminded of the judgment of the Hon'ble Apex Court in '**Padma Sundara Rao and Others v. State of T.N. and Others**' [(2002) 3 SCC 533] paragraph 9 which reads as follows:

*"It is also a settled proposition of law that Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case, said Lord Morris in 'Harrington v. British Railways Board'. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases."*

28. We are also conscious of the fact that if the intention of a particular provision of a statute can be gathered from the language used by the legislation, then we are bound to abide by the language used therein in order to ascertain the intention. We are also of the opinion that there was a clear logic behind Sec.36(1)(va) and Explanation thereto since the

Legislature intended that the amount received towards contribution of the employee was money belonging to the employee and the assessee was not entitled to utilise the said fund and enrich himself. So also, both the provisions supra will co-exist harmoniously without disturbing each other. Therefore, the distinction drawn to credit the amount of the employer and the employee was with a clear objective and there is no illegality or other legal infirmity in classifying the contributions of employees and employer in the matter of crediting the same to the appropriate statutory authorities.

29. In that view of the matter, we are of the considered opinion that the view taken by the Tribunal which affirmed the decision of the 1<sup>st</sup> Appellate Authority that the Respondent was entitled to get deduction of the contributions received from the employees if paid on or before the filing of the return under Sec. 139(1) was not correct. We are inclined to agree with the judgment of the Gujarat High Court in '**Gujarat State Road Transport Corporation**'s case (supra). We are also of the opinion that the judgments of the other High Courts referred to by the learned counsel for the Respondent do not lay down the law correctly.

30. Learned counsel for the Respondent has also contended that when two views are possible, one in favour of the assessee shall be adopted and our attention was drawn to the decisions in '**Commissioner of Income-Tax v. Podar Cement Pvt. Ltd. and Others**' [(1997) 226 ITR 625], '**Manish Maheshwari v. Asst. Commissioner of Income Tax and Another**' [(2007) 289 ITR 341 (SC)] and '**Indore Construction P. Ltd. v. Commissioner of Income-Tax**' [(2007) 289 ITR 341] and canvassed for the said proposition. But since we are of the clear opinion that the assessee was entitled to get the deduction of the amounts as provided under Sec.36(1)(va) only if the amounts so received from the employee was paid within the due date as provided under the relevant statute, we do not think that this is a case to which such a principle is applicable.

31. Therefore, the questions of law raised by the Revenue is answered affirmatively in favour of the Revenue. In the facts and circumstances of the case, we set aside the order of the Tribunal in I.T.A. No.8/2014 dated 09.05.2014 so far as the questions raised herein are concerned and restore the order of the Assessing Officer.

Accordingly, the appeal is allowed.

Sd/-  
**ANTONY DOMINIC  
JUDGE**

Sd/-  
**SHAJI P. CHALY  
JUDGE**

//true copy//

P.S. to Judge

St/-