

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

**ITA No. 215 of 2010
Date of decision: 22.9.2015**

Commissioner of Income Tax, Faridabad

.....Appellant

M/s Lakhani Rubber Udyog P. Limited

.....Respondent

**CORAM: HON'BLE MR. JUSTICE AJAY KUMAR MITTAL
HON'BLE MR. JUSTICE RAMENDRA JAIN**

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not?
3. Whether the judgment should be reported in the Digest?

Present: Mr. Tajender K.Joshi, Advocate for the appellant-revenue.

Ms.Rajni Pal, Advocate for the respondent-assessee.

Ajay Kumar Mittal,J.

1. The revenue has preferred this appeal under Section 260A of the Income Tax Act, 1961 (in short, “the Act”) against the order dated 19.6.2009, Annexure A.III passed by the Income Tax Appellate Tribunal Delhi Bench 'D' New Delhi (in short, “the Tribunal”) in ITA No.4527/Del. of 2007 for the assessment year 1999-2000, claiming following substantial questions of law:-

“I. Whether, on the facts and in the circumstances of the case, the learned ITAT was right in law in confirming the order of the learned CIT(A) in deleting the addition of ₹ 19,36,019/- made by the Assessing Officer on account of late deposit of

employees' contribution to PF disregarding the fact that the payments were made beyond the due dates and were therefore not allowable under section 36(1)(va) and were to be treated as income under section 2(24)(x) of the Income Tax Act, 1961, in contravention of the decision in the case of **CIT vs. Pamwi Tissues Limited**, 215 CTR 150 (Bom.)?

II) Whether, on the facts and in the circumstances of the case, the learned ITAT was right in law in confirming the order of the learned CIT(A) in deleting the addition of ₹ 17,88,364/- made by the Assessing Officer on account of late deposit of employer's contribution to EPF and FPF as without appreciating the fact that payments were not made by the assessee within the prescribed due dates by which the assessee was required to make payments, in contravention of the decision in the case of **CIT vs. Pamwi Tissues Limited**, 215 CTR 150 (Bom.)?

III. Whether, on the facts and in the circumstances of the case, the findings recorded by the learned ITAT are perverse and contrary to the evidence available on record as disallowance of ₹ 12,09,031/- on account of depreciation on let out building was made by the Assessing Officer as the assessee had failed to adduce, any rent agreement, the portions of building let out and used for purposes of business as claimed by assessee was not verifiable and without giving an opportunity of being heard for necessary verification by the Assessing Officer decided the issue?"

2. A few facts relevant for the decision of the controversy involved as narrated in the appeal may be noticed. On 29.12.1999, the assessee filed return declaring income of ₹ 93,92,140/- which was processed under section 143(1) on 26.2.2001. Thereafter, proceedings under section 147 of the Act were initiated by issuing and serving notice under section 148 of the Act on the assessee on 19.1.2006. The assessment was

completed under sections 147/143(3) of the Act on 29.9.2006, Annexure A.I at an income of ₹ 1,40,90,510/-. The Assessing Officer made addition of ₹ 12,09,031/- on account of depreciation in respect of whole of the building as let out and addition of ₹ 18,04,473/- on account of late payment of employees' contribution to Provident Fund and ₹ 17,88,364/- on account of employer's contribution to EPF and FPF. The assessee filed appeal before the Commissioner of Income Tax (Appeals) [CIT(A)]. Vide order dated 13.9.2007, Annexure A.II, the appeal was partly allowed giving relief of ₹ 46,80,965/- to the assessee. The revenue went in appeal before the Tribunal. Vide order dated 19.6.2009, Annexure A.III, the Tribunal dismissed the appeal. Hence the instant appeal by the revenue.

3. We have heard learned counsel for the parties.

4. During the course of hearing on 21.7.2010, learned counsel for the revenue conceded that question Nos. I and II were covered against the revenue by judgment of the Apex Court in ***Commissioner of Income Tax vs. Alom Extrusions Limited***, (2009) 319 ITR 306. Consequently, vide order dated September 27, 2010, the appeal was admitted to consider question No.III only.

5. With regard to question Nos. I and II, while considering identical question, a Division Bench of this Court in ***Commissioner of Income Tax vs. Rai Agro Industries Limited***, (2011) 334 ITR 122 following the decision of the Apex Court in ***Alom Extrusions Limited's*** case (supra) held as under:-

“5. The point for determination in this appeal is, whether the amendment made by Finance Act, 2003, effective from 1.4.2004 whereby second proviso to Section 43B stands

omitted would govern the earlier cases from 1.4.1988 also.

6. It would be appropriate to delve into brief legislative history and the purpose of enacting the provisions of Section 43B of the Act before embarking on the adjudication of the controversy involved in the present appeal.

7. Section 43B provides for disallowance of unpaid statutory liability. This Section was inserted by the Finance Act, 1983, with effect from 1.4.1984. The purpose of this provision is to discourage those assesses who failed to clear their statutory liability relating to payment of excise duty, employees' contribution to provident fund etc. within time whereas they laid claim for deductions in respect thereof from their income on the plea that liability to pay these amounts had occurred during the relevant previous year. After the insertion of Section 43B, the assessee was entitled to claim deduction on account of these payments only on actual payments even where the assessee had been following mercantile system of accountancy. The provision at that time comprised of only clauses (a) and (b) and Explanation which was later re-numbered as Explanation 1. The two provisos before the Explanation to the Section were incorporated by Finance Act, 1987 effective from 1st April, 1988. The Finance Act, 1988 amended clause (a) with effect from 1st April, 1989. The rigours of clause (a) were lessened by first proviso which permitted deduction of tax liability wherever it was established that it had been discharged, though not during the previous year, but before the due date for filing of return under Section 139(1) of the Act. However, the second proviso which related to liabilities falling under clause (b) had more rigid conditions. The second proviso, which is relevant for decision of this appeal, reads thus:

“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 during the previous year on or before the due date as defined in the Explanation before clause (va)

of sub-section (1) of section 36.”

The Finance Act, 2003 effective from 1.4.2004 made an amendment whereby second proviso to Section 43B of the Act was omitted from the statute book.

The issue relating to retrospective operation of omission of second proviso to Section 43B of the Act was considered by the Supreme Court in **Commissioner of Income Tax v. Alom Extrusions Ltd.** (2009) 319 ITR 306 (SC) wherein it was held that it is curative in nature and would apply retrospectively, with effect from April 1, 1988. The relevant observations of the Supreme Court are as under (Page 316):

“.....We hold that the Finance Act, 2003, to the extent indicated above, is curative in nature, hence, it is retrospective and it would operate with effect from April 1, 1988 (when the first proviso came to be inserted). For the above reasons, we find no merit in this batch of civil appeals filed by the Department which are hereby dismissed with no order as to costs.”

In view of the above, the Tribunal was right in allowing the claim of the assessee in respect of payments made for ESI contributions and the same could not be disallowed under Section 43B of the Act. The question of law is, thus, answered against the Revenue and in favour of the assessee.”

In view of the above, the Tribunal was right in allowing the claim of the assessee.

6. As regards question No.III, the Assessing Officer disallowed ₹ 12,09,031/- on account of depreciation by taking the whole of the building as let out and income was assessed under the head “income from house property”. On appeal by the assessee, the CIT(A) upheld the action of the Assessing Officer in disallowing the depreciation on the rented building but held that the total area in dispute relating to Plot Nos.131 and 235 which

was shared for purposes of sister concerns came to 1,27,993 square feet i.e. 1/10th of the actual property involved, the depreciation should be disallowed only to the extent of 1/10th and not the entire depreciation as the rest of the building was clearly the factory premises out of the said rented building. Therefore, 1/10th of ₹ 12,09,031/- came to ₹ 1,20,903/- and the balance disallowance of ₹ 10,88,128/- was deleted. The CIT(A) in para 5.2. of its order recorded as under:-

“5.2. I have carefully considered the submissions of the learned AR and perused the assessment orders where the matter has been discussed in para 3 to 7 and the learned AR's arguments appeared at page 13 of the paper book vide letter addressed to the ACIT, Range II, Faridabad, on this point from pages 13 to 19 of the said paper book. During the discussions with the learned AR, he has left the matter regarding the treatment of income from business to income from house property to be decided on merits. Keeping in view the present position of the entire facts and circumstances and the arguments and discussions held by the AO in his assessment order, the income from rented building treated as rental income by the appellant company is considered under the head income from house property, and therefore, the action of the AO in disallowing the depreciation on the rent building in these two orders is upheld. However, keeping in view the plea of the appellant that the total area in dispute for the purpose of Plot No.131 and 35 comes to 1,27,993 square feet i.e. 1/10th of the actual property involved, the depreciation should be disallowed only to the extent of 1/10th and not the entire depreciation, as the rest of the building is almost clearly the factory premises of the said rented building. Therefore, 1/10th of ₹ 12,09,031/- comes to ₹ 1,20,903/- and of ₹ 14,23,431/- comes to ₹ 1,42,343/- and these are disallowed accordingly and the balance

disallowances are deleted in both the assessment years.”

7. On appeal by the revenue, the Tribunal affirmed the findings recorded by the CIT(A) as under:-

“7. Learned counsel for the assessee contends that depreciation was disallowed under a mistake by AO. Assessee had let out 10% part of the factory premises to its associated concerns for administrative work which facilitated the assessee's group operations, rent was charged from such associated concerns and offered as business income. In the course of assessment proceedings, AO asked about the extent of building let out. Assessee by a chart submitted the same which is part of the record. AO without asking further questions, by mistake held that 10% is utilized by the assessee and 90% is let out besides the rental income was treated under the head business income. Assessee preferred first appeal where correct position was explained to CIT(A), who on proper verification corrected the issue of depreciation by holding that 10% area was let out and thereby depreciation to this extent was disallowed:

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8. We have heard the rival contentions and perused the material on record. From the perusal of the paper book, it emerges that assessee had supplied details about let out area before AO, besides CIT(A) has carried out enquiries and ascertained that 1/10th area was let out to associated concerns, the finding of CIT(A) is based on factual verification, which is supported by assessee's submissions before AO. In view thereof, we see no infirmity in the order of the CIT(A) which is upheld on this issue.”

8. It has been categorically recorded by the Tribunal while affirming the findings arrived at by the CIT(A) that only 10% area was let out by the assessee to its associated concerns for administrative work

whereas the remaining area was being used by it. Thus, depreciation only to the extent of 1/10th was disallowed. No error was pointed out by the learned counsel for the revenue in the findings recorded by the CIT(A) as well as the Tribunal. Thus, the substantial questions of law are answered accordingly. The appeal stands dismissed.

(Ajay Kumar Mittal)
Judge

September 22, 2015
'gs'

(Ramendra Jain)
Judge