

IN THE HIGH COURT OF JUDICATURE AT PATNA

Miscellaneous Appeal No.309 of 2008

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M/S Bihar State Warehousing Corporation Ltd., B-II, First Floor, Maurya Lok
Complex, Patna – 800001, through Shri Umesh Chandra Sharma, Managing
Director

.... Assessee-Appellant

Versus

1. Commissioner of Income Tax-1, Patna
2. Dy. Commissioner of Income Tax, Circle-2, Patna

.... Respondents

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Appearance :

For the Appellant : Mr. Ajay Kumar Rastogi, Adv.
Mr. Parijat Saurav, Adv.

For the Respondent/s : Mrs. Archana Sinha, Sr. SC, IT
Mr. Alok Kumar
Ms. Shalini Bihari

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CORAM: HONOURABLE MR. JUSTICE HEMANT GUPTA

and

HONOURABLE MR. JUSTICE RAMESH KUMAR DATTA

ORAL JUDGMENT

Date: 16-03-2016

Heard learned counsel for the appellant and learned
counsel for the respondent-Revenue.

The assessee-appellant, being a Public Sector
Undertaking of the Government of Bihar, had filed a return of
income declaring total income of Rs. 51,23,740/- on 01.11.2004 for
the assessment year 2004-05 and its case was processed. The
Assessing Officer passed an order under Section 143(3) of the
Income Tax Act by which, inter alia, the delayed payment of Rs.
10,90,330/- on account of employees provident fund was treated as

income in terms of Section 2(24)(x) read with Section 36(1)(va) of the Act.

On appeal by the assessee, the Commissioner of Income Tax (Appeals) upheld the order of the Assessing Officer. On further appeal to the Income Tax Appellate Tribunal, it was held by the Tribunal that dues for the month of November, 2003 and February, 2004 totaling to Rs. 3,86,277/- had been paid before the due date of payment, as prescribed under Section 36(1)(va) of the Act, and addition of the said amount was, accordingly, deleted. However, with respect to the balance amount of Rs. 7,04,053/-, the dues of the other months, the Tribunal agreed with the orders of the Assessing Officer and the Commissioner of Income Tax (Appeals) holding that the said delayed payment of employees' contribution to ESI and EPF aggregating to Rs. 7,04,053/- has rightly been treated as income of the assessee under Section 2(24)(x) of the Act. Accordingly, the addition/disallowance was restricted to the said amount of Rs. 7,04,053/-. Aggrieved by the same the assessee filed the present appeal under Section 260A of the Income Tax Act, 1961 in which while admitting the appeal the following substantial question of law was framed:-

“Whether on the facts and in the circumstances of the case the Tribunal is justified in upholding the addition of Rs. 7,04,053/- made under Section

2(24)(x) read with Section 36(1)(va) of the Income Tax Act?”

Learned counsel for the parties agreed that the said substantial question of law has already been decided by this Court by order dated 31.03.2015 passed in Misc. Appeal No. 401 of 2008 (Commissioner of Income Tax-1, Patna & anr. Vs. Alken Laboratories Ltd.) relying upon a decision of the Apex Court dated 07.03.2007 in the case of CIT Vs. Vinay Cements Limited which reiterated the earlier decision of the Apex Court in the case of Commissioner of Income Tax Vs. Alom Extrusions Ltd: (2009) 319 ITR 306 (SC).

In Alom Extrusions case (supra) the Apex Court in the relevant part of para-16, has held as follows:-

“16. We find no merit in these civil appeals filed by the Department for the following reasons: firstly, as stated above, section 43B (main section), which stood inserted by the Finance Act, 1983, with effect from April 1, 1984, expressly commences with a non obstante clause, the underlying object being to disallow deductions claimed merely by making a book entry based on the mercantile system of accounting. At the same time, section 43B (main section) made it mandatory for the Department to grant deduction in computing the income under section 28 in the year in which tax, duty, cess, etc., is actually paid.



However, Parliament took cognizance of the fact that the accounting year of a company did not always tally with the due dates under the Provident Fund Act, Municipal Corporation Act (octroi) and other tax laws. Therefore, by way of the first proviso, an incentive/relaxation was sought to be given in respect of tax, duty, cess or fee by explicitly stating that if such tax, duty, cess or fee is paid before the date of filing of the return under the Income-tax Act (due date), the assessee(s) then would be entitled to deduction. However, this relaxation/incentive was restricted only to tax, duty, cess and fee. It did not apply to contributions to labour welfare funds. The reason appears to be that the employer(s) 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. However, as stated above, the second proviso resulted in implementation problems, which have been mentioned hereinabove, and which resulted in the enactment of the 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. Once this uniformity is brought about in the first proviso, then, in our view, the Finance Act, 2003, which is made applicable by Parliament only with effect

from April 1, 2004, would become curative in nature, hence, it would apply, retrospectively, with effect from April 1, 1988.”

In view of the aforesaid proposition laid down by the Supreme Court, the admitted position being that the aforesaid amounts were credited after the due dates of payment under the relevant Acts but much before the date of filing of the return under the Income Tax Act, the assessee would clearly be entitled to the deletion of the addition. The substantial question of law is, accordingly, answered in the negative against the Revenue and in favour of the assessee.

The appeal is, accordingly, allowed.

(Hemant Gupta, J)

S.Pandey/-

(Ramesh Kumar Datta, J)

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