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ITXA-529-2003 (SR.38)

Monday, 2.7.2018

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 529 OF 2003

A.T.E. Pvt. Ltd.

....Appellant

V/s.

1. Assistant Commissioner of  
Income-Tax, Circle-1(1) and Ors.

....Respondents

\* \* \* \* \*

Mr. Nitesh Joshi a/w. Mr. Ashok Boghani i/by. Ashok  
Boghani & Co., Advocate for the appellant.

Mr. Suresh Kumar, Advocate for the respondent.

**CORAM :-**

**M.S. SANKLECHA, &**

**SANDEEP K. SHINDE, JJ.**

**DATE :-**

**2ND JULY, 2018.**

**P.C. :-**

1. This is an appeal under Section 260A of the Income Tax, 1961 (the Act) from the order dated 24<sup>th</sup> February, 2003 of the Income Tax Appellate Tribunal (the Tribunal). It was admitted on 19th October, 2004 on the following substantial question of law.

*“Whether the Tribunal was justified in upholding the disallowance of Rs.11,62,131/- by applying the provisions of Section 43B even though the appellant was admittedly accounting for the expenditure on a cash basis ?”*

2. Mr. Joshi, Learned Counsel appearing in support of the Appeal at the final hearing seeks to urge the following re-framed question of law as a substantial question of law for our consideration :

*“Whether the Tribunal was justified in upholding the disallowance of Rs.11,62,131/- by applying the second proviso to section 43B ?”*

3. The above proposed question of law has been communicated to the respondent-Revenue.

4. Mr. Joshi, Learned Counsel appearing for the appellant, invites our attention to para-9 of the impugned order of the Tribunal wherein the benefit of deduction to

payments made to various funds was disallowed in view of the second proviso to Section 43B of the Act as existing at the relevant time. Therefore, it is urged that this re-framed question of law as urged is a substantial question of law and a subject matter of consideration by the impugned order. We are satisfied that the proposed re-framed question of law is a substantial question of law and therefore in terms of the proviso to sub-section 4 of section 260A of the Act, we allow the question to be raised and admit the same as a substantial question of law.

5. Mr. Suresh Kumar, Learned Counsel appearing for the Revenue has no objection to the same being considered and disposed of finally today.

6. Thus, the following two substantial questions of law arise for our consideration :

*“1. Whether the Tribunal was justified in upholding the disallowance of Rs.11,62,131/- by applying the provisions of*

*Section 43B even though the appellant was admittedly accounting for the expenditure on a cash basis ?”*

*2. Whether the Tribunal was justified in upholding the disallowance of Rs.11,62,131/- by applying the second proviso to section 43B ?”*

7. **Regarding Question no.1 :**

(a) Mr. Joshi, Learned Counsel appearing for the appellant does not press the same.

(b) Thus, no occasion to opine on the same arises.

8. **Regarding Question no.2 :**

(a) The impugned order of the Tribunal upheld the rejection of the benefit of section 43B of the Act in respect of payment/ contributions made to the following:-

|     |                              |            |
|-----|------------------------------|------------|
| (i) | P.F. employer's contribution | Rs. 44,433 |
|     | P.F. employee's contribution | Rs. 44,433 |

- |      |                                |             |
|------|--------------------------------|-------------|
| ii)  | Gratuity Fund for the calender |             |
|      | year 1985 and 86 paid during   |             |
|      | the year                       | Rs.3,74,265 |
| iii) | Employer's Contribution for    |             |
|      | Superannuation fund            | Rs.6,99,000 |

This is on the ground that the aforesaid payments have been made beyond due date for making payment as prescribed under the relevant Act under which the payment had to be made.

(b). In this case, admittedly, the payments have been made beyond the due date as prescribed in the relevant Act, under which the aforesaid payments have been made. However, it is also undisputed that the payments have been made before the due date for filing the return of income under section 139 of the Act. However, the Tribunal held that in view of the second proviso to section 43B as existing in the previous year relevant to the subject Assessment Year 1988-89, the appellant would be dis-entitled to claim benefit of section

43B of the Act in respect of the above payments.

(c) However, with effect from 1<sup>st</sup> April, 2004 by the Finance Act, 2003 the second proviso to Section 43B of the Act, has been omitted. It is submitted that the above omission would operate retrospectively. Thus, entitling the appellate to its benefit.

(d) Mr. Joshi, learned Counsel appearing in support of the appeal states that the issue of the deletion of the second proviso to Section 43B of the Act now stands concluded in favour of the appellant - assessee by the decision of the Supreme Court in the case of **Commissioner of Income Tax Vs. Alom Extrusions Limited** reported in (2009) 227 CTR (SC) 417 = (2009) 319 ITR 306 (SC). In the above case, the Court held that the omission made by the Finance Act, 2003 by deletion of second proviso to section 43B of the Act would operate retrospectively from 1<sup>st</sup> April 1988 from the time it was first introduced. Thus, in the absence of the second

proviso to Section 43B of the Act, the only requirement of the statute is that the payment to the various funds should be made before the filing of the return of income under Section 139(1) of the Act as required by the first proviso thereof. It is an undisputed position before us that this condition is satisfied in this case.

(e) It must also be pointed out that so far as the payment of the employees' contribution to P.F. is concerned, it would also be covered by the first proviso to Section 43B of the Act. It has been so held by this Court in the case of **CIT Vs. Ghatge Patil Transport Limited, 368 ITR 749** wherein this Court held that the Apex Court decision in the case of *Alom Extrusions* (supra) would apply.

(f). Mr. Suresh Kumar, Learned Counsel for the Revenue, very fairly does not dispute the above position in law. Therefore, this issue now stands concluded in favour of the appellant-Assessee and against the

respondent-Revenue.

(g). In the above view, the substantial question of law is answered in the negative i.e. in favour of the appellant-Assessee and against the respondent-Revenue.

9. Thus, the Appeal is allowed in above terms. No order as to costs.

(SANDEEP K. SHINDE, J)

(M.S. SANKLECHA, J)