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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 23.08.2021

CORAM :

The Honourable Mr. Justice T.S.SIVAGNANAM

and

The Honourable Mr. Justice SATHI KUMAR SUKUMARA KURUP

Tax Case Appeal No.447 of 2016

The Commissioner of Income Tax,
Chennai.

...Appellant

Vs

Tamil Nadu Maritime Board,
No.171, South Kesavaperumalpuram,
Off. Greenways Road, Raja Annamalaipuram,
Chennai - 600 028.

Pan: AAATT9514E

...Respondent

APPEAL under Section 260A of the Income Tax Act, 1961 against the order dated 21.08.2015 made in ITA.No.862/Mds/2015 on the file of the Income Tax Appellate Tribunal, 'B' Bench, Chennai for the assessment year 2010-2011.

Against the appellate order of the Commissioner of Income-Tax (Appeals)2, Chennai, dated 29.12.2014 made in ITA.No.318/13-14/A-1 for the Assessment year 2010-11 against the order of the Assistant Commissioner of Income Tax Circle III, Chennai, dated 07.03.2013 made in PAN.No.AAATT9514E for the Assessment year 2010-11.

For Appellant : Mr.T.Ravikumar
Senior Standing Counsel

For Respondent : M/s.N.V.Lakshmi

JUDGMENT

(Delivered by T.S.Sivagnanam, J)

This appeal by the revenue is directed against the order dated 21.08.2015 passed by the Income Tax Appellate Tribunal [hereinafter referred to as "the Tribunal"], 'B' Bench, Chennai in I.T.A.No.862/Mds/2015 for the assessment year 2010-2011.

2.The appeal was admitted on 20.07.2016 to decide the following substantial questions of law:



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"1. Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in holding that the contribution made towards superannuation fund has to be treated as business expenditure allowable under Section 37 of the Income Tax Act?

2. Is not the finding of the Tribunal bad by directing the AO to allow expenditure under Section 37 when the assessee failed to obtain necessary approval from the competent authority viz., Principal Commissioner of Income Tax for the year under consideration and the deduction falls squarely within the ambit of Section 36(1)(iv) r/w. Section 40A(9)?"

3. We have heard Mr. T. Ravikumar, learned Senior Standing Counsel appearing for the appellant/revenue and M/s. N. V. Lakshmi, learned counsel appearing for the respondent/assessee.

4. It is not disputed before us that identical substantial questions of law were decided in the assessee's own case in T.C.A. Nos. 287, 288, 296 and 298 of 2020 dated 08.10.2020. The operative portion of the judgment reads as follows:

"3. We need not labour much to go into the facts of the case as similar question has been decided by the Division Bench of this Court on identical facts in the case of Commissioner of Income Tax v. Kattabomman Transport Corporation Limited [(268 ITR 507 Mad)].

4. In fact, the Tribunal had decided the above issue in favour of the assessee by referring to the assessee's own case in I.T.A. No. 862/Mds/2015 for the Assessment Year 2010-11, which was decided in favour of the assessee by the Tribunal, following the decision in the case of Kattabomman Transport Corporation Limited (cited supra). The operative portion of the said judgment reads as follows:

"There are two references before us one by the Revenue and the other at the instance of the assessee. Both the references relate to the assessments made for the year 1976-77 under the provisions of the Income-tax Act, 1961.

2. Two questions referred at the instance of the revenue are :



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"1. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in holding that the sum of Rs. 9,75,485 was allowable as a deduction with reference to the Employees' Provident Funds Act, 1952, read with section 2(38) of the Income-tax Act, 1961 ?

2. Whether, on the facts and in the circumstances of the case, the provision made for contribution of Rs. 1,03,251 towards the provident fund maintained by the Government of Tamil Nadu on account of Government employees sent on deputation to the assessee-corporation is an allowable deduction in computing its income ?"

3. We shall consider the questions referred to us at the instance of the revenue before we proceed to consider the questions referred to us at the instance of the assessee.

4. The first question relates to the deductibility of the amount paid as contribution to the provident fund maintained by the assessee which admittedly has not been recognised by the Commissioner of Income-tax, as the recognition of the fund either under the Act or under the Employees' Provident Funds Act is a pre-condition for allowing any contribution to the provident fund as a deduction in view of section 2(38) of the Act and section 36 of the Act.

5. Section 2(38) of the Act defines 'recognised provident fund' as meaning a provident fund which has been and continues to be recognised by the Chief Commissioner or Commissioner in accordance with the rules contained in Part A of the Fourth Schedule, and includes a provident fund established under a scheme framed under the Employees' Provident Funds Act, 1952 (Act 19 of 1952). Section 36(1)(iv) permits the deduction or contribution made only to a recognised provident fund or an approved superannuation fund. Under section 2(38) of the Act, it is only a scheme framed under the Employees' Provident Funds Act which is deemed to be an approved provident fund for the purpose of the Income-tax Act even though such a fund has not received the express approval of the Commissioner of Income-tax.



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6.The assessee herein did not claim that fund to which contribution has been made was one set up under the scheme of the Employees' Provident Funds Act. On the other hand, it sought exemption from the provisions of that Act for the scheme framed by it on the ground that the benefits available to the employees under that scheme were not less than those available under the provisions of the Employees' Provident Funds Act. The order granting exemption from the provisions of the Act, cannot be treated as an order recognising the scheme as one framed under the Act. The very object of exemption granted under section 17 of the Employees' Provident Funds Act is to render the scheme immune from the application of the provisions of the Employees' Provident Funds Act, subject to such conditions as may be prescribed while granting such exemption.

7.The scheme referred to in section 2(38) of the Income-tax Act is a scheme either framed under the Employees' Provident Funds Act, or a scheme approved by the Commissioner of Income-tax. The assessee's claim does not answer either of these requirements for this assessment year. A scheme which has been exempted from the provisions of the Provident Funds Act does not become a scheme framed under that Act. The words under the Act clearly imply and require that the scheme is one which is subject to the Act. The scheme to which an Act is rendered inapplicable by virtue of exemption is not a scheme framed under the Act.

8.Our answer to the first question therefore is in favour of the revenue and against the assessee.

9.So far as the second question is concerned, that question has to be answered in favour of the assessee. The amount paid by the assessee to the Government in order to enable the Government to credit the amount so paid to the provident fund account of the Government employees who were at that point of time working in the Corporation, is part of the amount payable by the Corporation to the Government for availing of the services of Government employees. The fact that the Government after receipt of the amounts from the Corporation, chooses to credit that amount to the provident fund account of the concerned employee of the Government, does not render the payment paid by the corporation a contribution by the Corporation to the provident



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fund maintained by the Government for the benefit of its employees. The amount so paid to the Government is not in any way affected by section 36 of the Act. The payment so made is deductible under section 37 of the Act, being part of the business expenditure of the assessee. This question is therefore answered in favour of the assessee and against the revenue.

10. The questions referred to us at the instance of the assessee are :

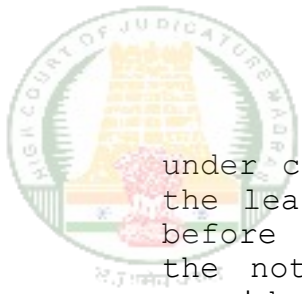
"1. Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that a sum of Rs. 82,500 paid towards unexpired portion of the route permit was not a revenue expenditure ?

2. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in holding that the payment of Rs. 3,50,000 to the Chief Minister's Drought Relief Fund was not an allowable deduction ?"

The first of these questions is covered against the assessee by a judgment of this Court in the case of Anna Transport Corpn. Ltd. v. CIT [1995] 215 ITR 800 wherein, it was held that the amount paid towards unexpired portion of the route permit is not a revenue expenditure. Following that judgment and for the reasons stated therein, we answer this question against the assessee and in favour of the revenue.

The second question referred to us at the instance of the assessee is required to be answered in favour of the assessee in the light of the decision rendered by this Court in the case of CIT v. Cheran Transport Corpn. Ltd. [1996] 219 ITR 203, wherein a similar donation was held to be an allowable deduction. Following that judgment and for the reasons stated therein, we answer the second question in favour of the assessee and against the revenue."

5. The learned senior standing counsel appearing for the revenue does not dispute the fact that the above decision had answered the substantial questions of law framed in this appeal in favour of the assessee in the assessee's own case for the assessment year 2007-2008, 2009-2010 and 2011-2012 and the year



under consideration is AY 2010-2011. However, the endeavour of the learned senior standing counsel for the revenue is to place before this Court certain decisions which were not brought to the notice of this Court earlier and if those decisions are considered, the Court may take a different view than what was taken in the judgment dated 08.10.2020.

6.The first of such decisions referred to by Mr.T.Ravikumar, learned senior standing counsel is in the case of Aspinwall & Co. Ltd. vs. Deputy Commissioner of Income Tax [(2007) 295 ITR 0553], wherein it was held that after the insertion of sub-section (9) in Section 40A, no deduction is to be allowed in respect of any sum paid by the assessee as an employer towards contribution to a Provident fund except where such amount is paid for the purpose of and to the extent provided by or under section 36(1)(iv) of the Act. Further it has been held that in view of the provisions of Section 40A(9), no deduction could be allowed in respect of any sum paid towards contribution to a provident fund by taking recourse to Section 37 of the Act.

7.The learned senior standing counsel referred to the decision in Commissioner of Income Tax vs. N.Radha Bai (Binod Cashew Corporation) [(1989) 180 ITR 0429], wherein it was held that in order to claim deduction for gratuity payment, the assessee should fulfill the conditions laid down in section 40A of the Act. Reliance was placed on the decision of the Delhi High Court in the case of Sony India (P) Ltd. vs. Commissioner of Income Tax [(2006) 285 ITR 0213], wherein it is held that contribution made by an assessee to gratuity funds and superannuation funds which were not approved during the year under consideration did not qualify for deduction under Section 36 of the Act; deductions being claimed by the assessee are admittedly of the nature described in Section 36(1)(iv) and (v) and therefore the same cannot be allowed under section 37 of the Act. To the same effect, reliance was placed on the decision of the High Court of Delhi in the case of Jay Metal Industrial Private Ltd. vs. Commissioner of Income Tax [(2017) 396 ITR 0194 (Delhi)]. After placing reliance on these decisions, the learned senior standing counsel referred to the observations made by the Assessing Officer as well as the Commissioner of Income Tax (Appeals) [hereinafter referred to as CIT(A)] and submitted that the Tribunal ought not to have interfered with the said finding.

8.M/s.N.V.Lakshmi, learned counsel for the respondent submitted that identical questions of law have already been answered in the assessee's own case for the earlier assessment year and subsequent assessment year in favour of the assessee and the revenue cannot pray for a different relief in the



present appeal as the substantial questions of law are covered by the earlier decision which has attained finality. Further, the learned counsel submitted that what was argued before this Court was raised before the Tribunal by way of a miscellaneous application in M.P.No.226/Mds/2015 which was dismissed by order dated 25.02.2016 and the appellant is not on appeal against the said order which has attained finality and the revenue should not be permitted to canvass the points now sought to be urged before this Court for the first time and not when the earlier appeals were heard.

9.After elaborately hearing the learned counsels for the parties, we are of the view that the decision in the assessee's own case in T.C.A.Nos.287, 288, 296 and 298 of 2020 dated 08.10.2020 will hold good and the order passed by the Tribunal is liable to be confirmed. We support such conclusion with the following reasons.

10.Firstly, as rightly pointed out by the learned counsel for the respondent/assessee, identical issue was canvassed before the Tribunal by way of a miscellaneous petition which was considered by the Tribunal and the Tribunal examined the factual background as to why the assessee Board had to remit these monies into a separate fund which was admittedly created for the welfare of the employees. The moot question would who are those employees who may be benefited. Those employees were initially employed in the Port Department and the State Government gave an option to those employees to work under the respondent/assessee/Board and it was made clear that the employees who opted to work under the assessee/Board to have the same tenure, remuneration, rights and privilege as to pension and gratuity. Therefore, these set of employees who admittedly is a diminishing group, their service conditions could not be altered because as per the option given by the State Government if exercised by the concerned employee of the erstwhile Port Department, none of their service conditions which was prevailing when they were working in the Port Department could be altered. Admittedly, the absorption based on the option exercised by those employees took place in the year 1997 and remittances have been made to the fund ever since. The present attempt of the revenue to deny the deduction was for the first time during the assessment year 2007-2008. It is not clear as to what prompted the revenue to do so. In any event, the assessee has got relief from the Tribunal for the assessment years 2007-2008, 2009-2010 and 2011-2012 which orders were confirmed by this Court in T.C.A.Nos.287, 288, 296 and 298 of 2020 dated 08.10.2020. It was never the assessee's case that the funds to which they have remitted money is an approved fund.



11. In contradiction with the cases which were relied on by the revenue where two provisions were pitted against each other, namely, Section 36(1)(iv) and Section 40A(9) of the Act. The question was when deduction was impermissible under Section 36(1)(iv) r/w. Section 40A(9) of the Act, whether the assessee can claim deduction under a general provision, namely, Section 37 of the Act. This question was rightly answered in favour of the revenue and against the assessee in all the four decisions referred above. However, in the instant case, the assessee never claimed any benefit under Section 36 of the Act nor was its claim that the remittance is towards a fund which was approved by the Department. Admittedly, approval was granted on 19.03.2014 with effect from 02.08.2013 by the respondent Department. Therefore, the period in dispute is hardly five assessment years of which for three assessment years, the Court has decided the matter in favour of the assessee and the fourth year is the year under consideration in this appeal. Therefore, the Tribunal took note of the facts and as to under what circumstances remittance had to be made and when the respondent/assessee had no option except to accept those employees who had exercised option and joined the services of the Board to be entitled to all service benefits as if they were employees of the Port Department of the State Government. Hence, we are of the view that the case on hand has to be dealt with entirely on a different yardstick, more particularly, on the factual position which we have elaborated above.

12. At this juncture, we may refer to the decision of the Hon'ble Supreme Court in the case of Commissioner of Income Tax vs. Textool Co. Ltd., [(2013) 216 Taxman 327(SC)], wherein the Hon'ble Supreme Court explained the real intention of Section 36(1)(v) of the Act. It was held that from a bare reading of the said provision, the real intention behind the provision is that the employer should not have any control over the funds of the irrevocable Trust created exclusively for the benefit of the employees. Admittedly, there is no such allegation against the respondent/assessee, alleging that this was a device adopted by the assessee as a vehicle for tax avoidance. In fact this aspect is what weighed in the minds of the Court while deciding the case in Aspinwall & Co. Ltd. and precisely for such reason, the Court referred to the explanatory note attached to Section 40A(9) of the Act. The note clearly states that the Trust which have been set up as a discretionary Trust with absolute discretion to the trustees to utilize the trust property in such manner as they may think fit for the benefit of the employees without any scheme or safeguards for the proper disbursement of funds would be used as vehicle for tax avoidance. By claiming deduction in respect of such contribution which may even flow back to the employer in the form of deposits or investments in shares, etc. Furthermore, the assessee in the said case had no



governmental control. Equally are the decisions in the case of N.Radha Bai and Sony India (P) Ltd.

13.As pointed out earlier, the proposition laid down in the aforementioned three decisions relied on by the revenue stating that if the assessee is not entitled to claim deduction under Section 36 of th Act, he cannot be allowed to claim deduction under Section 37 of the Act. There can be no quarrel on this legal proposition. Nevertheless we need to decided the case based on facts. As explained in the case of Textool Co. Ltd., the intention behind the provision assumes importance. There can be no allegation that the respondent Board had adopted such procedure as a tax avoidance measure rather it was a duty cast upon them based on the direction issued by the Government.

14.The revenue sought to distinguish the decision in the case of Commissioner of Income Tax vs. Kattabomman Transport Corporation Ltd. [(2004) 268 ITR 0507] by contending that the employees therein were under deputation, whereas the employees for whom the respondent/assessee had effected the deposits have been absorbed. On noting the facts in the instant case, we find that the case on hand is a better case on facts than that of Kattabomman Transport Corporation Ltd. as absorption into the respondent/assessee/Board is pursuant to the State Government decision which gives option to the erstwhile employees of the Port Department to become permanent employees of the respondent/assessee/Board subject to the condition that their service conditions which include gratuity remains unaltered. Therefore, the decision in Kattabomman Transport Corporation Ltd., would fully apply to the facts and circumstances of the case.

15.In the light of the above, we are of the view that the decision rendered in the assessee's own case in T.C.A.Nos.287, 288, 296 and 298 of 2020 dated 08.10.2020 will hold good and consequently, the substantial questions of law framed for consideration in this appeal have to be answered against the revenue and accordingly answered.

16.In the result, the tax case appeal is dismissed. No costs.

Sd/-

Assistant Registrar(CS VI)

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Sub Assistant Registrar

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To

1. The Income Tax Appellate Tribunal,
'B' Bench,
Chennai.

2. The Commissioner of Income Tax,
(Appeals)-2,
Chennai.

3. The Assistant Commissioner,
of Income Tax (Circle II),
Chennai.

+1cc to M/s.N.V.Balaji, Advocate, S.R.No.42387
+1cc to M/s.T.Ravikumar, Advocate, S.R.No.42210

TCA.No.447 of 2016

RLD[co]
NSK 16/09/2021