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Allowability of the payment of employees' contributions to EPF/ESIC under section 43B beyond due dates specified in the relevant statutes, but before due date of filing the return of income

In brief

Recently, in the cases of Kichha Sugar Company Ltd¹ and LKP Securities Ltd², the Uttarakhand High Court and the Mumbai Income-tax Appellate Tribunal (the Tribunal) respectively discussed the allowability of the employee's contribution to the Employees Provident Fund/Employees State Insurance Corporation (EPF/ESIC) under section 43B of the Income-tax Act, 1961 (the Act) if paid before the due date of filing the return of income.

¹CIT v. Kichha Sugar Company Ltd [TS – 211 – HC – 2013 (Utt)]

² LKP Securities Ltd v. ITO [TS – 203 – ITAT – 2013 (Mum)]

Kichha Sugar Company Ltd v. CIT

Facts

Kichha Sugar Company Ltd (the assessee) collected the employee's contribution to the EPF but did not remit it within the due date prescribed by the relevant legislation (the 15th of the following month). The assessing officer (AO) disallowed the payments on the basis that the obligations to pay accrued within an accounting year, but were discharged in the subsequent accounting year before the due date of filing the income-tax return. The Commissioner of Income-tax (Appeals) (CIT(A)) held that the money was no longer in the hands of the employer and could not be taken to be income in the assessee's hands. This view was upheld by the Tribunal.

Issue before the High Court

The issue before the High Court was the allowability of delayed remittance of employee contribution to EPF when made beyond the due date as defined under the relevant statute, though before the due date of filing the return of income of the relevant year.

Revenue's contentions

The revenue authorities contended that in view of section 36(1)(va) read with section 2(24)(x) of the Act, if the employees' contribution to EPF was not paid within the due date specified in the relevant statute, it would not be allowed as a deduction under the Act.

High Court ruling

The High Court held that while any sum received by the assessee from his employees towards contributions to the EPF was the assessee's income, section 36(1)(va) of the Act allowed it as a deduction if the contribution received was deposited on or before the due date under the relevant statute.

Section 43B(b) of the Act provided that any sum payable by the assessee as an employer by way of contribution to any provident fund would be allowed as a deduction irrespective of the previous year in which the liability had incurred, only in that previous year in which the sum is actually paid by him.

The due date referred to in section 36(1)(va) of the Act must be read in conjunction with section 43B(b) of the Act. Such a reading made it amply clear that the due date as mentioned in the aforesaid sections was the same.

Hence, the High Court held that payment or contribution made to the EPF authorities any time before filing the return for the year in which the liability to pay accrued would be allowed as a deduction along with evidence to establish payment thereof.

LKP Securities Limited v. ITO

Facts

The assessee collected the employee's contribution to EPF and ESIC but did not remit it within the due date prescribed by the relevant legislation, *viz.* 15th of the following month for EPF contributions and 21st of the following month for payments to the ESIC.

The AO disallowed the payments on the basis that the payments were made beyond the due date given under section 36(1)(va) read with section 2(24)(x) of the Act.

The CIT(A) relied on the Supreme Court ruling in the case of Alom Extrusions Ltd³ and of the Delhi High Court in AIMIL Ltd⁴ and reversed the AO's findings.

Aggrieved, the revenue authorities went in appeal.

Issue before the Tribunal

The key issue raised for consideration by the revenue was on the allowability or otherwise of payment of employees' contributions to EPF and ESIC made beyond the due date as defined under the relevant statutes, though before the due date of filing of return of income for the relevant year.

Revenue's contentions

The revenue contended that employees' contributions to EPF/ESIC, if not paid by the employer within the due date under relevant statutes, could not be allowed as deduction. To support its contentions, the revenue relied on the Kolkata Tribunal ruling in the case of Bengal Chemicals and Pharmaceuticals Ltd⁵ wherein it had

³ CIT v Alom Extrusions Ltd [2009] 319 ITR 306 (SC), [2009] 185 Taxman 416 (SC), [2009] 227 CTR 417 (SC)

⁴ CIT v AIMIL Ltd [2010] 321 ITR 508 (Del), [2010] 188 Taxman 265 (Del), [2010] 229 CTR 118 (Del)

⁵ DCIT v Bengal Chemicals & Pharmaceuticals Ltd [2011] 10 taxmann.com 26(Kol), [2011] 46 SOT 33 (Kol)

been observed that the payments to EPF/ESIC were not governed by section 43B of the Act. Furthermore, the revenue contended that the amendments to section 43B of the Act would have no bearing on the deductibility of payments covered under section 36(1)(va) of the Act, as held by the Bombay High Court in Pamwi Tissues Ltd⁶ which clarified that the dismissal of special leave petition (SLP) in the case of Vinay Cement Ltd⁷ could not be said to be a law decided and hence would not have any bearing on its decision.

Assessee's contentions

The assessee argued that the Supreme Court in the case of AIMIL Ltd (above) considered the decision in the Vinay Cement Ltd (above) and held that the amendment to section 43B by the Finance Act, 2003 would apply to the employer's as well as the employees' contribution to the various welfare funds.

The decision in the case of Pamwi Tissues Ltd (above) was no longer good law after the pronouncement of the Supreme Court in the case of Vinay Cement Ltd (above) and Alom Extrusions Ltd (above).

Tribunal ruling

The Tribunal observed that section 43B of the Act covers only the sums payable by the assessee as an employer himself or herself to EPF/ESIC. The amendment to section 43B, pertaining to the extension of time limit was not applicable to the employees' contribution.

The Tribunal discussed section 2(24)(x) of the Act which deems the sum retained by the employer toward the employees' contribution (for onward payment) as the employer's income and section 36(1)(va) of the Act correspondingly provides for deduction of these sums when paid to the credit of the employee's account in the relevant fund by the due date.

'Due date' defined as per Explanation to section 36(1)(va) of the Act is the date by which the employees' contribution has to be credited to the employee's account in the relevant fund under any Act, Rule, order or notification issued there-under. Thus, for the payment to be allowable under the aforesaid section, actual payment before the due date is necessary.

The Tribunal further observed that section 43B of the Act provides for an additional qualification stipulating that payment should be 'otherwise allowable under the Act'. The payment having not been made by the due date under section 36(1)(va), is not allowable under the Act. Therefore, there is no scope for application or invocation of section 43B of the Act.

The Tribunal relied on the Special Bench (SB) ruling in the case of ITC Ltd⁸ and the Kolkata Tribunal ruling in the case of Bengal Chemicals and Pharmaceuticals Ltd (above) wherein similar issues were considered.

Further, the Tribunal distinguished the SC ruling in Vinay Cement Ltd and Alom Extrusions Ltd (above) which were rendered in the context of retrospective amendment to section 43B of the Act. It also distinguished the SC ruling in AIMIL Ltd (above) as not applicable given that it was pronounced on the premise that employees' contribution is subject to section 43B of the Act and did not discuss the SB ruling in ITC Ltd (above).

Thus, the Tribunal concluded that the deductibility of the aforesaid payments had to be seen only with reference to section 36(1)(va) and not section 43B of the Act.

PwC Comments

The rulings on the subject differ and leave room for further litigation by the tax department and the assessee. On an overall basis, a favourable view has been taken by the High Court which should be a relief to assessees.

⁶ CIT v Pamwi Tissues Ltd [2009] 313 ITR 137 (Bom), [2008] 215 CTR 150 (Bom)

⁷ CIT v Vinay Cement Ltd [2007] 213 CTR 268 (SC)

⁸ CIT v ITC Ltd [2008] 112 ITD 57 (Kol)(SB), [2008] 115 TTJ 45 (Kol)(SB)

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