

imp Power Ltd. Vs. Ito

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Court : Income Tax Appellate Tribunal ITAT Mumbai

Decided On : Jan-18-2006

Judge : R Tolani, V Gupta

Appellant : imp Power Ltd.

Respondent : ito

Judgement :

1. This appeal, filed by the assessee, is directed against order dated 26-4-2005, of the learned Commissioner (Appeals), Mumbai, for the assessment year 2001-02.

2. We have heard both the parties and have also perused material on record.

1. That whether the learned Commissioner (Appeals) as justified by confirming the disallowance of prior-period expenses of Rs. 26,33,535 which relates to travelling/staff welfare/car/conveyance and petty purchases and could not be booked during the financial year on account of non-furnishing/producing of the bills

2. That whether the learned Commissioner (Appeals) was justified in confirming the disallowance of Rs. 23,87,187 on account of legal expenses by invoking Section 40(a)(i) paid to an international U.K. based firm to appear before the international court of law on account of dispute

3. That whether on facts and circumstances of the case the learned Commissioner (Appeals) was justified by upholding the disallowance of Rs. 22,18,828 being employees contribution on account of delayed payments

4. That whether the learned Commissioner (Appeals) was justified by not saying a single word about ground No. 5 for disallowance of Rs.

373 on account of penalty." The assessee is a Public Limited Company, engaged in the manufacturing of Power and Distribution Transformers; Electrical Equipments, Meters and Testing Equipments. The assessee filed its return of income on 31-10-2001 declaring total income at nil after claiming deduction under Section 80-IB for Rs. 51,87,187. However, the assessee declared profit of Rs. 1,30,25,600 as per the provisions of Section 115JB and the tax was paid thereon accordingly. The case was processed under Section 143(1)(a) and subsequently was selected for scrutiny. Assessment under Section 143(3) of the Act was completed on 26-3-2004 at Rs. 75,31,880 after making disallowances as discussed in the assessment order.

5.1 The relevant facts relating to ground No. 1 are that the assessing officer noted from Form 3-CD that the assessee had charged Rs. 26,33,535 to the Profit and Loss Account which were represented by prior-period expenses comprising of Travelling, Staff Welfare, Car Expenses, Conveyance, etc. These expenses also included Purchase of Goods. The assessing officer (hereinafter referred to as "assessing officer"), relying on the observations of the Auditors and in view of the fact that the assessee was following Mercantile System of Accounting, held that the treatment of these expenses in its accounts, in the year under consideration, were not in conformity with the accounting method adopted by the assessee and, accordingly, disallowed the expenses and re-worked out, the profits/losses of respective units to which such expenses were related.

5.2 Aggrieved by the decision of the assessing officer, the assessee carried the matter in appeal before the learned Commissioner (Appeals).

The Commissioner (Appeals), after considering the findings of the assessing officer and the submissions made by the assessee, confirmed the order of the assessing officer and recorded his findings as under: 2.2 I have considered the submissions of the appellant. This is, clearly, not the first year in which such petty cash expenses have been claimed by the appellant. The onus for establishing the circumstances justifying non-booking of expenses in the relevant previous years lies on the appellant. If the appellant is able to satisfactorily prove that the expenses could not be made because of peculiar reasons and circumstances

beyond its control, the claim could not be allowed in the year of settlement of the claim. In the present case, it is the employees of the appellant-company who are furnishing evidence of expenses incurred in the prior-period after the end of the financial year. It is well within the control of the appellant to entertain such claims before the close of the financial year, and make provision for such expenses that are likely to spell over into the subsequent year. It is also clear, that as the assessing officer has resorted to an addition on this account, the appellant was not able to satisfactorily prove to the assessing officer that settlement of these claims outside the realm of the control of the appellant. Accordingly, I do not see any reason to interfere with in the decision of the assessing officer and ground is dismissed." 5.3 Aggrieved by the decision of the Commissioner (Appeals), the assessee is in appeal before us.

5.4 The learned Counsel, appearing on behalf of the assessee, contended that these expenses were accounted for as and when the employees submitted the bills. With respect to the purchases, he drew our attention to the relevant page Nos. 11 to 25 of the Paper Book to show that there were specific circumstances which led to recording of the purchases in the year under consideration. With reference to the method of accounting relating to expenses, he contended that it was consistently followed by the assessee and therefore, the same should have been upheld. For allowance of expenses in the year under consideration, he relied on the decision of the Tribunal in the case of P.K. Overseas v. ITO 5.5 The learned Departmental Representative, besides relying on the order of the Commissioner (Appeals), contended that the assessee was following Mercantile System of Accounting and there were no circumstances which could be termed as beyond the control of the assessee, resulting into recording of the expenses in the year under consideration. He also contended that the Auditors had also qualified their report, and, therefore, the assessee had no case. He further contended that had there been a case of business loss, and if such practice was to be allowed, that would result into giving the assessee additional year for carrying forward of losses.

5.6 The learned Counsel for the assessee in the rejoinder, pointed out that the Auditors had merely mentioned in Form 3-CD but did not qualify their Report.

5.7 We have considered the submissions made by both the sides, material on record, the orders of the authorities below and also applicable legal provisions. Admittedly, the assessee is a Company, incorporated under the provisions of the Companies Act, 1956, and, therefore, the assessee is required to maintain its account on Mercantile System of Accounting, based on Fundamental assumption of "Accrual". The concept of Accrual is based upon the matching principle of cost with revenue and vice versa. The provisions of Income Tax Act, 1961, were also amended with effect from Assessment Year 1997-98 requiring the assessee either to follow the Cash Basis of Accounting or Mercantile System of Accounting. Since the assessee is a Company. it has got no choice but to follow Mercantile System of Accounting only. The basic purpose of Mercantile System of Accounting is to derive correct and true financial results. Therefore, it is utmost necessary to make provisions for ascertained liability towards expenses at the end of the year. In this legal background and the accounting framework, the assessee ought to have recorded the expenses in the relevant accounting year, wherein the liability to incur such expenses crystallized. A perusal of the prior-period expenses brings out the fact that out of the total expenses of Rs. 26,33,535.40, Rs. 18,51,872.96 are related to the purchase of goods which are accounted for in the year under consideration though documentary evidences suggest that these purchases were made in the earlier accounting periods and the remaining amount of (Rs. 26,35,535.40-18,51,872.96) Rs. 6,83,662.34 comprises mainly of Travelling Expenses, Staff Welfare/General Expenses, Conveyance, Motor Expenses, Service Charges, etc. The learned Counsel for the assessee-company strenuously argued that the expenditure debited under the various Heads of Expenses, could not be accounted for in the previous accounting year because the bills/vouchers were received by the assessee after the expiry of the relevant accounting year. However, on the basis of Summary of prior-period expenses at pages 12 and 13 of the Paper Book, it is noted that in most of the cases, bills were submitted much earlier to the date of the filing of the return, therefore, the same should have been incorporated as expenditure of the relevant accounting year. Although the learned Counsel tried to justify the assessee's case but the fact is that the accounts of the assessee are mandatorily audited both under the provisions of the Companies Act, 1956, as well as the Income Tax Act, 1961, therefore, the assessee should have

made provisions in the relevant accounting period for the expenses based upon the bills/vouchers received subsequently. The contention of the assessee that it is following this method of accounting consistently, does not help the cause of the assessee inasmuch as if a practice is adopted which is not correct, as per law, then the same is liable to be rejected. Further, the said practice also violates the principle of matching of cost with revenue and also results into hybrid system of accounting which is not, at all, permitted now. The assessee placed its reliance on the decision of the Tribunal in the case of P.K. Overseas (supra) wherein the expenditure pertaining to earlier year, was allowed as deduction in the subsequent year. A perusal of the aforesaid decision brings out the fact that in that case, there was dispute regarding the amount of brokerage which was settled in the year in which such expenses were booked although the same pertained to the sales made in the earlier years and the reason for this was that the claim of brokerage was finally settled only in that year. However, in the present case, there is no dispute regarding the assessee's liability towards all these expenses. Thus, the case law, relied upon by the assessee, hardly extends any help to the cause of the assessee. Thus, as far as the various expenses are concerned, the assessee's case is not justified and is not in accordance with law.

Accordingly, the findings of the revenue authorities with respect to disallowance of expenditure of Rs. 6,83,662.34 are upheld.^{5.8} Regarding disallowance of purchase of goods, accounted for during the year under consideration, amounting to Rs. 18,51,872.96, the assessee has categorized such expenses into the following categories: Goods for which order was placed in the financial year 1999-2000 but goods actually received in April 2000 Goods received in the financial year 1999-2000 but not accepted by the assessee due to quality problems-so neither reflected in purchase nor in the Closing stock of that year and accounted for in the current accounting period as the material was replaced by the supplier in this year Goods worth Rs. 9,51,408 purchased and received in 1998 but goods only worth Rs. 7,18,785 was booked as purchases because the remaining goods were sent back due to quality problems which were replaced by the supplier in the financial year 2000-01, relevant to the assessment year 2001-02. Hence, accounted for accordingly.

Goods sent by the party in the last week of March 2000 but received in April 2000. Hence recorded in purchase of final accounting year 2000-01.

5.9 Purchase of goods are charged to the revenue in the year of consumption/Sale and Unconsumed/Unsold balance forms part of the Closing Stock. Thus, recording of purchases to the extent of unconsumed and Unsold quantities is revenue neutral. In cases where neither purchases are recorded nor the same is consumed or forms part of the Closing Stock, if the assessee is able to establish the circumstances where non-recording of such purchases can be justified then the assessee can be entitled to claim the purchases in the year of recording for the reason that if the purchases so recorded are not allowed as deduction that would lead to a situation where the sales pertaining to such goods would be taxed at gross value or if such goods forms part of Closing Stock then this would lead to a distorted figure of profit and both situations would result into taxation of unreal income.

5.10 In respect of the category of goods mentioned in Sl. (a) above, goods have been admittedly received in April 2000 and recorded in the books of account, therefore, on all consequential results should follow. To put it differently, either these goods have been consumed or sold or form part of closing stock of the year under consideration.

Therefore, the same is held as allowable as deductible in the year under consideration.

5.11 With regard to the goods mentioned in Sl. Nos. (b) and (c), the assessee has contended that there were quality problems and, therefore, goods were not accepted earlier. The assessee accounted for the goods when the correct replacements were made by the supplier. Technically speaking, if the goods are not accepted due to quality problems, transaction of purchase is, as such, not complete as per the provisions of the Sale of Goods Act and the assessee cannot be denied of its due merely because the Invoices pertained to the earlier accounting periods. Having stated so, however, we find that the assessee has not placed proper evidences on record to prove the fact of replacements in lieu of defective goods. Therefore, we deem it fit and proper to restore this issue to the

file of the assessing officer for verification of the supporting evidences, to be submitted by the assessee, in this regard, and, after affording adequate opportunity of hearing to the assessee allow deduction of purchases in respect of these goods.

5.12 Similarly, in case of goods in Sl. No. (d) above, the assessee has not placed material on record and, therefore, this issue is also restored back to the file of the assessing officer to be disposed of in terms of our direction for goods as mentioned in respect of goods at S1. Nos. (a) and (b) aforesaid in para 5.11. Thus, this ground of the assessee stands partly allowed.

6.1 The relevant facts relating to Ground No. 2 are that the assessing officer noted that the assessee had incurred Legal/Consultation Fees expenses to the tune of Rs. 36,67,323 which included a sum of Rs. 23,87,187 paid to UK based Legal Consultancy Firm in connection with the legal proceedings in UK relating to an Agreement with A. M/s. ETD. The assessing officer inquired from the assessee as to whether tax at source on such payments had been deducted by the assessee. The assessee submitted its reply as under: "Please refer your letter No. Income Tax Officer 3(2)(1) Set-. Asst.

2003-04 dated 6-2-2004 regarding your observation about the disallowance of legal charges paid to M/s. Waterson Hicks, Solicitors, London for not deducting the TDS for securing our interest and appearing in the International Court.

B. We have already narrated the circumstances necessitating the payment of legal charges. It is pertinent to note that in this case (iii) The payee is a non-resident and does not have any office/agent in India and is therefore, not assessed in India.

(v) The amount has not been paid/recovered by any agent of the NonResident in India.

the CBDT has classified that if all the above tests are satisfied then in that case no tax should be deducted from commission. Based on the above principle it is submitted that the ratio of principle enunciated in the above circular, Our payment is squarely covered by the same principle and should therefore be allowed.

We have been advised that since the Payee is not assessed provisions of Section 195 i.e., Chapter XVII are not applicable and once Chapter XVII is not applicable, the provisions of Section 40(1)(i) will also become redundant. Moreover, our country has a DTAA with Great Britain and therefore, no amount of TDS is to be deducted.

Needless to add that payment made by us is a running payment and the matter is still pending before the Court. In any case if any payment is to be deducted, the same should be deducted and paid at the time of final settlement of account, with the Solicitors." 6.2 The assessing officer was of the view that Circular No. 786, relied upon by the assessee, operated in different field of expenses and, therefore, was not of any help to the cause of the assessee. The assessing officer further held that the provisions of Section 40(a)(i) were of over riding nature and even took precedence over the provisions of Chapter XVII. Further, he also rejected the assessee's contention that payments made were of the nature of running payments and if any tax was to be deducted, the same would be deducted at the time of final settlement for the reason that the assessee had debited the amount of legal fees in the Profit & Loss Account which were made outside India on which no tax was deducted and, therefore, the provisions of Section 40(a)(i) were squarely attracted. Accordingly, the assessing officer disallowed the amount of legal consultation fee paid outside India.

6.3 Aggrieved by the decision of the assessing officer, the assessee preferred appeal before the Commissioner (Appeals) wherein the assessee reiterated the submissions made before the assessing officer and also placed reliance on the decision of the Tribunal in the case of Wipro Ltd. v. ITO (2005) 1 SOT 663 (Bang) and Lufthansa Cargo. (India) (P) Ltd. v. Dy. CIT (2004) 91 ITD 133 (Delhi). The Commissioner (Appeals), however, was of the view that the facts of the case relied upon by the assessee were different from the facts of the assessee and also held that the assessee had himself contended before the assessing officer that tax would be deducted at the time of final settlement of the bills. Therefore, he confirmed the findings of the assessing officer.

6.4 Aggrieved by the decision of the Commissioner (Appeals), the assessee is in appeal before us.

6.5 The learned Counsel, appearing on behalf of the assessee, narrated the factual matrix of the case and drew our attention to the relevant paras of the assessment order in this regard. He contended that once the payee was not liable to pay the tax on the amount paid outside India, under the provisions of the Income Tax Act, 1961, therefore, the assessee was not liable to deduct tax on such sum. Once there was no liability to deduct tax, the provisions of Section 40(a)(i) were not applicable and the amount was allowable as expenditure incurred in connection with the business of the assessee. In support of this contention, he placed reliance on the following decisions: 1. Maharashtra State Electricity Board v. Dy. CIT (2004) 90 ITD 793 (Mum)Asstt. CIT v. DHL Operations B.V. 6. Lucent Technologies Hindustan Ltd. v. ITO (2005) 92 ITD 366 (Bang)G. V.K. Industries Ltd. v. ITO 6.6 In addition, he further placed reliance on Circular No. 786 dated 7-2-2000, issued by the CBDT.6.7 The learned Departmental Representative, on the other hand, strongly supported the orders of the revenue authorities.

6.8 The learned Counsel, in rejoinder, contended that the Commissioner (Appeals) while confirming the action of the assessing officer, misinterpreted the Letter of the assessee in regard to the nature of payment inasmuch as he ignored the words "In any case if any payment is to be deducted" to mean, that the assessee himself admitted, that it would deduct the payment at the time of the final settlement of account with the Solicitors.

6.9 We have considered the submissions of both sides, material on record and the orders of the lower authorities. Admittedly, the services, to the assessee by the Firm of the UK based Solicitors, have been rendered outside India and the payee is Non-resident and does not have any Agent/Office in India and is not assessed in India. It is the case of the assessing officer that the provisions of Section 40(a)(i) are of overriding nature and, therefore, the same would prevail over the provisions of Section 195 of the Act. The Commissioner (Appeals) confirmed the action of the assessing officer mainly on the ground that the assessee had himself admitted that it would deduct tax from the final payments. We have reproduced the reply of

the assessee to the assessing officer at para 6 hereinbefore wherein it has been mentioned that if the assessee was required to deduct tax by law, the same would be deducted and paid at the final settlement of the account with the Solicitors. Thus, the reply of the assessee in no way leads to an inference which has been drawn by the learned Commissioner (Appeals).

For a moment, it is assumed to be so, even then, the assessee cannot be made to suffer, if, the law does not require the assessee to deduct tax. We are of the view that there is no conflict in the provisions of Section 195 and Section 40(a)(i) of the Act because the purpose of Section 195 is to ensure deduction of tax at source on payments to Non-resident which are chargeable under the provisions of this Act and Section 40(a)(i) also states the same principle in a sense that disallowance of deduction in respect of any sum which is chargeable under this Act and where the tax has not been deducted at source. Thus, the basic condition is chargeability of the sum paid to the Non-resident under the provisions of the Income Tax Act, 1961. Both the revenue authorities have not given a finding whether the amount paid to the Solicitors in UK, are chargeable to tax under the provisions of the Act. However, this aspect is settled by the decision of the Tribunal in the case of Maharashtra Electricity Board (supra) wherein it was held that where the provisions of article 15 of the DTAA, between India and UK, were applicable, payment of fee for legal consultancy services to UK based Firm of Solicitors, was taxable in UK and was not exigible to tax in India. Therefore, the assessee (Tax Deductor) was under no obligation to deduct tax at source from the payment so made. The assessee has further placed reliance on the Circular No. 786, issued by the CBDT on 7-2-2000. Although the said circular directly deals with the Export Commission but it essentially confirms the view that requirement of deduction at source under Section 195 would arise only if the impugned payment to the Non-resident is chargeable to tax in India. In this view of matter, we consider no necessity to further discuss other judicial precedents, relied upon by the assessee. In view of the above discussions, we are of the considered opinion that the revenue Authorities were not justified in disallowing the expenditure relating to legal fee paid to UK based Solicitors amounting to Rs. 23,87,187 and therefore, we reverse the same. The assessing officer is, accordingly, directed to allow the same in computing the income of the assessee in the year under consideration.

This ground of the assessee is, thus, accepted.

7.1 The relevant facts relating to Ground No. 3 are that the assessing officer noted that the Statutory Auditors in Annexure-III to Form 3-CD had pointed out regarding the delay in deposit of the Employers Contribution as well as the Employees Contribution and the amount involved was Rs. 32,92,112. The assessing officer, after discussing the provisions of the Act, disallowed Rs. 22,18,828 relating to Employers Contribution towards PF & ESIC and Rs. 18,17,267 relating to Employees Contribution under Section 43B of the Act due to delay in deposit.

7.2 Aggrieved by that the assessee carried the matter in appeal before the Commissioner (Appeals) wherein it was contended by the assessee that the delay occurred due to genuine difficulties faced by the assessee but the same was deposited before the due date of filing of the return. Therefore, the same may be allowed. The Commissioner (Appeals), however, confirmed the order of the assessing officer.

7.4 The learned Counsel, appearing on behalf of the assessee, narrated the factual matrix of the case and strongly relied on the decision of the Tribunal in the case of Addl. CIT v. Vestas RRB (India) Ltd. (2005) 92 ITD 1 (Delhi). Further he contended that in the aforesaid case the Tribunal, taking note of the changes made in Section 43B with effect from 1-4-2004, held that the amendment was of curative nature and hence it was to be taken as retrospectively. It was further emphasized that the Tribunal following the rule of Equitable Construction, allowed the deduction both in respect of the Employers Contribution and Employees Contribution towards Provident Fund and ESIC, paid before the due date of filing of Return of Income under Section 139(1) of Income Tax Act, 1961. Finally, it was submitted that in view of the above facts and the aforesaid decision of the Tribunal, the disallowance may kindly be deleted.

7.5 The learned Departmental Representative, on the other hand, supported the orders of the revenue authorities and placed reliance on the decision of the Tribunal in the case of Swaroop Vegetable Products Industries Ltd. v. JCIT (Asst.) (1980) 278 ITR 206 (sic) and in the case of APL (India) (P) Ltd. v. Dy. CIT 7.6 We have considered the submissions of both the sides, material on record, the orders

of the authorities below and also the applicable legal provisions. Admittedly, there is a delay in deposit of both the Employers and Employees Contributions towards PF and ESIC although the same has been deposited before the due date of filing of Return of Income.

7.7 With regard to the delay in deposit of the Employers Contribution there are catena of decisions wherein, amendment to Section 43 B by way of deletion of 2nd proviso to Section 43B and amendment to 1st proviso with effect from 1-4-2004 has been declared of curative nature and hence applicable retrospectively and accordingly payments which have been made before the due date of filing of Return of Income, have been held as allowable even in the cases pertaining to earlier years. The same principle has been reinforced by the Tribunal in the decision of the Vestas RRB (India) Ltd. (supra). The revenue has placed strong reliance on the decision of Tribunal in the case of Swarup Vegetable Industries Ltd. (supra) but considering the majority view on this issue, we decline to follow the same. Accordingly, we allow this ground of the assessee.

7.8 With regard to the assessee's claim for allowance of the Employees Contribution towards PF & ESIC, the assessee's case deserves to be rejected because Section 43B is not applicable at all in respect of the Employees Contribution towards PF & ESIC and assessee's claim in this regard has to be considered under Section 36(1)(va) and Section 2(24)(x) of the Income Tax Act, 1961. The same view has been taken by the Tribunal in the case of APL (India) (P) Ltd. (supra) which has been cited by the revenue. However, the assessee has strongly placed its reliance on the decision of the Vestas RRB India Ltd. (supra) wherein the Tribunal has held that the Employees Contribution towards PF & ESIC is also allowable if the same has been deposited before the due date of filing of Return of Income.

7.9 On the perusal of the order of the Tribunal in the case of Vestas RRB India Ltd. (supra) it is observed that the Tribunal has not considered the aspect of non-applicability of the provisions of Section 43B in respect of the Employees Contribution towards PF & ESIC although finding has been given regarding deduction of the same if it has been deposited before the due date of filing of

Return of Income.

7.10 The learned Counsel for the assessee has vehemently argued that disallowance of this amount as expenditure, in spite of the same having been deposited ultimately, would be too harsh and, therefore, equity demands that deduction should be allowed to the assessee. This contention of the assessee is liable to be rejected for the following reasons: Where there is no ambiguity in the provisions of any statute then any other interpretation would amount to encroachment in the field of legislation which is not permitted for the reason that it is an obligation on the part of the Legislature to review/rectify such difficulties. Having stated so, it is also settled judicial principle that reasonable construction may be applied while construing the statute if the literal construction defeats the object and purpose of the Act. Thus the basic question, which requires the answer, is whether denial of deduction in the case of the Employees Contribution towards PF & ESIC, after the due date as specified under Section 36(1)(va), would amount to defeat of manifest object and purpose of section though such disallowance may be harsh from the assessee's point of view. To answer this question we have to look into the background of the enactment of Section 2(24)(x) and Section 36(1)(va) of the Act. The aforesaid provisions were brought on statute with effect from 1-4-1988, by the Finance Act, 1987. As per the Circular No. 495 dated 22-9-1987, the object of enacting this provision was to take measures for penalizing the employers who mis-utilised the contribution to Provident Fund or any other Fund, set up under the provisions of ESI Act, 1948, or any other Fund, for welfare of the employees. Further by amendment by the Finance Act, 2003, 2nd Proviso to Section 43B was deleted and the 1st Proviso was amended. However, correspondingly no change in the provisions of Section 36(1)(va) was made which again goes to show that the Legislature, in its wisdom, did not think it proper to provide the employers any leaving in respect of the deposit of the Employees Contribution towards PF & ESIC. Ours is a welfare State and the Legislature is bound by the Directive Principles of State Policy, as enshrined in the Constitution of India, in making the laws although such principles are not justiciable. It is also true that Income Tax Act, 1961, is not a mere piece of fiscal legislation. It also tries to remove imbalances in the social and economic sphere of the country while providing fiscal incentives in respect of the expenses incurred for social welfare

such as provisions of weighted deduction in respect of the promotion of Family Planning, employment to Handicapped Persons, etc. and simultaneous it also provides for harsh measures like the provisions of sections 2(24)(x) and 36(1)(va) being necessary to protect the interest of employees. The Provident Fund Contribution and ESI Contributions are measures Of social Securities to the employees.

In this view of the matter, the Legislature has specifically enacted a deeming provision whereby treating the employees contribution as income of the assessee and requiring the assessee to get deduction of the same by depositing the amount thereof within the due date. The rationale behind this is simple because the employees rendering the services are supposed to get their due salary and by deduction their contribution out of the salary with the obligation to deposit the same, employers act as trustees of the employees. If the employees contribution towards ESIC is not deposited in time, employee may not be able to get medical facilities, which he is legally entitled to, merely for non-deposit of the amount by the employer, in spite of the same being deducted by the employer. Assuming a situation, for the sake of argument, that if it is field that the assessee may get deduction if the amount is deposited before the due date of filing of Return of Income, it would enable the employer to deposit the Employees Contribution towards PF & ESIC deducted in the month of April 2005 by 31-10-2006, which is a too long a period to be given to the employers because if any adverse business situation emerges in the intervening period, which results in iron-deposit of the employees contributions, the employees would be made to suffer without any default on their part. Further such a long period would also tempt the employers to utilise the money for their business, which would be manifestly against the objectives of the provisions. The principle of equitable construction is based on principle of equity. As far as the concept of Equity is concerned, it must be applied in favour of the weaker party. In this case, the employer is weaker than the State and the employee is weaker than the employer. Therefore, even on the principle of Equity, the interests of the employees should be taken care of particularly in a country like ours where social equality is a matter of grave concern for each individual.

7.11 In view of the above discussions, both in law and in Equity, we are of the considered opinion that the provisions of Section 43B being not applicable in respect of the Employees Contribution towards PF & ESIC, the order of the revenue Authorities in this regard is justified and, accordingly, we uphold the same. Thus, this ground of the assessee stands partly allowed.

8. Regarding Ground No. 4, from the perusal of the written submissions, made by the assessee before the Commissioner (Appeals), through its Letter dated 14-3-2005, placed at page 5 of the Paper Book, it is observed that the same was not pressed before the Commissioner (Appeals). Therefore, the Commissioner (Appeals) did not adjudicate on this ground. Thus, this ground is not maintainable before the Tribunal and the same is dismissed.

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