Karnataka High Court Cit vs Sabari Enterprises on 3 July, 2007 Equivalent citations: 2008 298 ITR 141 KAR, 2008 298 ITR 141 Karn Author: V G Gowda Bench: V G Gowda, N Ananda JUDGMENT V. Gopala Gowda, J. 1. These appeals are filed by the revenue questioning the impugned orders passed by the Tribunal in Appeal No ITA 1713/Bang/2005, dated 17-3-2006, framing the following substantial questions of law: 1. Whether the Tribunal was correct in holding that the contributions made by the assessee to PF and ESI are allowable deduction even though it is made beyond the stipulated period as contemplated under the mandatory provisions of Section 36(1)(va) read with Section 2(24)(x) and Section 43B of the Act as the same was paid by the assessee on or before the due date for furnishing the return of income as per Section 139(1) of the Act ? 2. Whether the Tribunal was correct in holding that the amendment to Section 43B of the Act which had been introduced by Finance Act, 2003, w.e.f 1-4-2004 should be read retrospectively and should be understood as if Section 43B would not be applicable to the assessee in the light of the judgment of the Apex Court in Allied Motors (P) Ltd. v. CIT We have extracted the substantial questions of law only in one appeal, viz., IT Appeal No. 1088 of 2006 since other appeals are connected. 2. Learned Counsel Sri M.V. Seshachala appearing for appellants, has called in question the orders passed by the Tribunal, by placing reliance upon the mandatory provisions of Section 36(1)(va) read with Section 2(24)(x) and Section 43B(b) of the Income Tax Act; he has contended, that contributions should be paid to have been made within the specified date by the assessee to avail the relief of deduction from gross income. In support of his contention he has also placed reliance upon the decision of the Apex Court reported in Allied Motors (P) Ltd. v. CIT . Para 60 of the said decision reads thus: 60. Several cases have come to notice where taxpayers do not discharge their statutory liability such as in respect of excise duty, employer's contribution to PF, ESI Scheme, etc., for long periods of time, extending sometimes to several years. For the purpose of their income-tax assessments, they claim the liability as deduction on the ground that they maintain accounts on mercantile or accrual tests basis. On the other hand, they dispute the liability and do not discharge the same. For some reason or the other, undisputed liabilities also are not paid. To curb this practice, it is proposed to provide that deduction for any sum payable by the assessee by way of tax or duty under any law for the time being in force (Irrespective of whether such tax or duty is disputed or not) or any sum payable by the assessee as an employer by way of contribution to any PF, or superannuation fund or gratuity fund or any other fund for the welfare of employees shall be allowed only in computing the income of that previous year in which such sum is actually paid by him. (Emphasis herein italicized in print supplied) Regarding Section 43B, it is further held in the said decision as follows: Section 43B was, therefore, clearly aimed at curbing the activities of those taxpayers, who did not discharge their statutory liability of payment of excise duty, employer's contribution to PF, etc., for long periods of time but claimed deductions in that regard from their income on the ground that the liability to pay these amounts had been incuned by them in the relevant previous year. It was to stop this mischief that Section 43B was inserted. It was

clearly not realised that the language in which Section 43B was worded, would cause hardship to those taxpayers who had paid sales-tax within the statutory period prescribed for this payment, although the payment so made by them did not fall in the relevant previous year. This was because the sales-tax collected pertained to the last quarter of the relevant accounting year. It could be paid only in the next quarter which fell in the next accounting year. Therefore, even when the sales-tax had in fact been paid by the assessee within the statutory period prescribed for its payment and prior to the filing of the income-tax return, these assessees were unwillingly prevented from claming a legitimate deduction in respect of the tax paid by them. This was not intended by Section 43B. Hence, the first proviso was inserted in Section 43B. The amendment which was made by the Finance Act of 1987 in Section 43B by inserting, inter alia, the first proviso, was remedial in nature, designed to eliminate unintended consequences which may cause undue hardship to the assessee and which made the provision unworkable or unjust in a specific situation. In the light of the above decision he submitted that employer's contribution payable by the assessee towards PF or superannuation fund or gratuity fund or any other fund for the welfare of the employees, though they are liable for deduction under Section 36(1)(va) read with Section 2(24)(x) of the Act, the same can be claimed as deduction by the assessee only if the contribution is paid within the due date for claiming exemption under the aforesaid provisions of the Act. He has also placed reliance upon various Division Bench judgments of different High Courts, viz., Calcutta, Madras, Kerala and Rajasthan High Courts in support of the aforesaid legal submissions to contend that in these cases the respondents/assessees who are the employers were/are statutorily liable to pay PF contribution to its employees under the provisions of the Provident Fund Act, the same were not paid by them within the due date payable under the provisions of the Act. Therefore, it has been held by the assessing officer that they are not entitled to claim deduction under the provision of Section 43B Clause (b) for the amount of contributions payable by them under Section 36(1)(va) read with Section 2(24)(x) of the Act. With reference to the said decisions, he requests this Court to. answer the above substantial questions of law framed by this Court in favour of the revenue by setting aside the impugned orders passed by the Tribunal in the appeals filed by the assessees. 3. On behalf of the assessees/respondents, learned Counsel Sri Parthasarathy, Dr. R.B. Krishna, Smt. Nitya have sought to justify the orders passed by the Tribunal by placing strong reliance upon the above provisions of the Act and decisions of the Apex Court in the Allied Motors's case referred to supra. 4. Learned Counsel for respondents Sri Parthasarathy has made the submissions placing strong reliance upon the provision of Section 36(1)(va) and Section 43B(b). In support of their contention, learned Counsel has invited our attention to the judgment of the Apex Court in the case of Allied Motors (P) Ltd. v. CIT (supra), particularly with reference to proviso of Section 43B Clause (b) at para 60 extracted from Finance Bill of 1983. He invited our attention to the provision in the Finance Bill of 1983 which reads thus: 59. Under the Income Tax Act, profits and gains of business and profession are computed in accordance with the method of accounting regularly employed by the assessee.

Broadly stated, under the mercantile system of accounting income and outgo are accounted for on the basis of accrual and not on the basis of actual disbursements or receipts. For the purpose of computation of profits and gains of business and profession, the Income Tax Act defines the word 'paid' to mean 'actually paid or incurred' according to the method of accounting on the basis of which the profits or gains are computed. The learned Counsel for respondents have submitted that the object and intendment of insertion of Section 43B, by way of amendment to the Act by the Finance Act with effect from 1-4-1984 stipulates, notwithstanding anything contained in the provisions of the Income Tax Act, a deduction is allowable in respect of any sum payable by the assessee as an employer by way of contribution towards PF or other funds referred to under Clause (b) of Section 43B of the Act. He submitted that Section 43B was inserted to the Act to curb the practice of non-payment of undisputed statutory liabilities by the assessees for the welfare of employees. Further, he has contended, reliance placed by the learned Counsel for the revenue upon the decisions of various High Courts were all rendered prior to amendment of Section 43B before deletion of second proviso to the above provision by Finance Act, 2003 w.e.f. 1-4-2003. He also placed strong reliance upon deletion of clauses of alphabetical letters referred to in first proviso to the above provision such as Clause (a) or (c) or (d) or (e) or (f). Learned Counsel Sri Parthasarathy, appearing for respondents in some of the appeals has also placed reliance upon another decision of the Supreme Court reported in General Finance Co. v. CIT , in support of his legal contention that the words "removed" or "omitted" occurring in the statutory provision of the first proviso to Section 43B of the Act are omitted by way of amendment. The "omission" is different from "repeal" as held by the Constitution Benches of the Supreme Court of India in the cases reported in AIR 1970 SC 494 and , and the Act will not apply to omission of a provision but only to repeal. Therefore, he contends that the removal of letters (a) or (c) or (d) or (e) or (f) which were numbered as sub-clauses occurred in the first proviso to Section 43B of the Act were not there from the date the Income Tax Act has come into force as the above clauses were omitted by way of amendment in the first proviso. 5. Learned Counsel Dr. Krishna, appearing for some of the respondents in the connected appeals has strongly placed strong reliance upon the provisions of Section 43(B) wherein it provides certain deductions as provided under Clause (b) should be allowed irrespective of the previous year in which liability to pay such sum was incurred by the assessee according to the method of accounting regularly employed by him. Therefore, the legal submissions made on behalf of the revenue to satisfy the statutory liability of payment of PF amount under the provisions of the statutory enactment of Provident Fund Act need not be paid within the due date for claiming deduction of that amount in the returns submitted by the respondents in these appeals. Therefore, the submission made by the learned Counsel for the revenue is wholly untenable in law and the substantial questions of law as framed do not arise in these appeals, therefore, the same has to be answered against the revenue. 6. The above submissions of the learned Counsel for the assessee in these appeals are adopted by the other learned Counsel for the assessees in

the connected appeals. 7. After hearing the learned Counsel for the parties, we have carefully examined the above statutory provisions of the Act including definition of Section 2(24)(x) and Sections 36(1)(va) and 43B(b), which read thus: 2(24) 'Income' includes (x) any sum received by the assessee from his employees as contribution to any PF or superannuation fund or any fund set up under the provisions of the Employees State Insurance Act, 1948 (34 of 1948) or any other fund for the welfare of such employees. 36(1) The deductions provided for in the following clauses shall be allowed in respect of the matters dealt with therein, in computing the income referred to in Section 28 (va) any sum received by the assessee from any of his employees to which the provisions of Sub-clause (x) of Clause (24) of Section 2 apply, if such sum is credited by the assessee to the employee's account in the relevant fund or funds on or before the due date. ExplanationFor the purposes of this clause, 'due date' means the date by which the assessee is required as an employer to credit an employee's contribution to the employee's account in the relevant fund under any Act, rule, order or notification issued thereunder or under any standing order, award, contract of service or otherwise. This clause is inserted by Finance Act with effect from 1-4-1988. Explanation to this clause is read very carefully. "Due date" has been explained stating that "means the date by which the assessee is required as an employer to credit contribution to the employee's account in the relevant fund under any Act, rule or order or notification issued thereunder or under any standing order, award, contract of service or otherwise". Prior to the above clause was inserted to Section 36 giving statutory deductions of payment of tax under the provisions of the Act, Section 43B(b) was inserted by Finance Act, 1983 which came into force with effect from 1-4-1984. Therefore, again the provision of Section 43B(b) clearly provides that notwithstanding anything contained in other provisions of the Act including Section 36(1), Clause (va) of the Act, even prior to the insertion of that clause the assessee is entitled to get statutory benefit of deduction of payment of tax from the revenue. If that provision is read along with the first proviso of the said Section which was inserted by Finance Act, 1987 which came into effect from 1-4-1988, the letters numbered as Clause (a) or (c) or (d) or (e) or (f) are omitted from the above proviso and, therefore, deduction towards the employer's contribution paid can be claimed by the assessee. The Explanation Clause (va) of Section 36 of the Income Tax Act further makes it very clear that the amount actually paid by the assessee on or before the due date applicable in this case at the time of submitting returns of income under Section 139 of the Act to the revenue in respect of the previous year can be claimed by the assessees for deduction out of their gross income. The abovesaid statutory provisions of the Income Tax Act abundantly make it clear that, the contention urged on behalf of the revenue that deduction from out of gross income for payment of tax at the time of submission of returns under Section 139 is permissible only if statutory liability of payment of PF or other contribution funds referred to in Clause (b) are paid within the due date under the respective statutory enactments by the assessees as contended by the learned Counsel for the revenue is not tenable in law and, therefore, the same cannot be accepted by us. 8. The learned Counsel Sri Parthasarathy and Dr. Krishna, appearing for respondents,

also drew our attention to the deletion of second proviso to Section 43B of the Income Tax Act by Finance Act, 2003 which provision has come into force, with effect from 1-4-2004. The reliance placed upon the decision of the Apex Court in Allied Motors (P) Ltd. v. CIT (supra) and also on the decision in General Finance Co. v. CIT (supra) in respect of applicability of Section 43B(b) and also omission of Clause (a) or (c) or (d) or (f) referred to above occurred in the first proviso to Section 43B, supports the case of the assessees and also relevant paras extracted from Allied Motor's case (supra) and para 59 referred to supra in this judgment from the Finance Bill with all fours support the case of the assessees/respondents. Therefore, we have to answer the substantial question of law No. 1 framed by this Court in these appeals at the instance of the revenue against them, viz., in the negative (sic). Accordingly, we answer the substantial question No. 1 framed in these appeals in the negative (sic).