REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.7771 OF 2009
(Arising out of S.L.P. (C) No.23851 of 2007)

Commissioner of Income Tax ...Appellant(s)

Versus

M/s. Alom Extrusions Limited ...Respondent(s)

With Civil Appeal No.7770/2009 @ S.L.P. (C) No.17835/2008, Civil Appeal No.7765/2009 @ S.L.P. (C) No.28521/2008, Civil Appeal No.7769/2009 @ S.L.P. (C) No.6844/2008, Civil Appeal No.7767/2009 @ S.L.P. (C) No.9589/2008, Civil Appeal No.7756/2009 @ S.L.P. (C) No.9590/2008, Civil Appeal No.7766/2009 @ S.L.P. (C) No.9591/2008, Civil Appeal No.7763/2009 @ S.L.P. (C) No.14363/2008, Civil Appeal No.7764/2009 @ S.L.P. (C) No.17840/2008, Civil Appeal No.7758/2009 @ S.L.P. (C) No.20012/2009, Civil Appeal No.7762/2009 @ S.L.P. (C) No.1344/2009, Civil Appeal No.7755/2009 @ S.L.P. (C) No.20581/2008, Civil Appeal No.7757/2009 @ S.L.P. (C) No.18380/2009, Civil Appeal No.7760/2009 @ S.L.P. (C) No.3759/2009, Civil Appeal No.7754/2009 @ S.L.P. (C) No.21067/2009, Civil Appeal No.7759/2009 @ S.L.P. (C) No.25174/2009, Civil Appeal No.7768/2009 @ S.L.P. (C) No.30587/2008 and Civil Appeal No.7761/2009 @ S.L.P. (C) No.1476/2009.

J U D G M E N T

S.H. KAPADIA,J.

Civil Appeal No.7771/2009 @ S.L.P. (C) No.23851/2007, Civil Appeal No.7770/2009 @ S.L.P. (C) No.17835/2008, Civil Appeal No.7765/2009 @ S.L.P. (C) No.28521/2008, Civil Appeal No.7769/2009 @ S.L.P. (C) No.6844/2008, Civil Appeal No.7767/2009 @ S.L.P. (C) No.9589/2008, Civil Appeal No.7756/2009 @ S.L.P. (C) No.9590/2008, Civil

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Appeal No.7766/2009 @ S.L.P. (C) No.9591/2008, Civil Appeal No.7763/2009 @ S.L.P. (C) No.14363/2008, Civil Appeal No.7764/2009 @ S.L.P. (C) No.17840/2008, Civil Appeal No.7758/2009 @ S.L.P. (C) No.20012/2009, Civil Appeal No.7762/2009 @ S.L.P. (C) No.1344/2009, Civil Appeal No.7760/2009 @ S.L.P. (C) No.3759/2009, Civil Appeal No.7754/2009 @ S.L.P. (C) No.21067/2009, Civil Appeal No.7759/2009 @ S.L.P. (C) No.25174/2009, Civil Appeal No.7768/2009 @ S.L.P. (C) No.30587/2008 and Civil Appeal No.7761/2009 @ S.L.P. (C) No.1476/2009.

Delay condoned.

Leave granted.

A short question which arises for determination in this batch of civil appeals is: whether omission [deletion] of the second proviso to Section 43-B of the Income Tax Act, 1961, by the Finance Act, 2003, operated with effect from 1st April, 2004, or whether it operated retrospectively with effect from 1st April, 1988?

Prior to Finance Act, 2003, the second proviso to Section 43-B of the Income Tax Act, 1961 [for short, "the Act"] restricted the deduction in respect of any sum payable by an employer by way of contribution to provident fund/superannuation fund or any other fund for the welfare of employees, unless it stood paid within the specified due date. According to the second proviso, the payment made by the employer towards contribution to provident fund or any other welfare fund was allowable as deduction, if paid before the date for filing the Return of income and necessary evidence of such payment was enclosed with the Return of income. In other words, if contribution stood paid after the date for filing of the Return, it stood disallowed. This resulted in great hardship to the

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employers. They represented to the Government about their hardship and, consequently, pursuant to the Report of the Kelkar Committee, the Government introduced Finance Act, 2003, by which the second proviso stood deleted with effect from 1st April, 2004, and certain changes were also made in the first proviso by which uniformity was brought about between payment of fees, taxes, cess, etc., on one hand and contribution made to Employees' Provident Fund, etc., on the other.

According to the Department, the omission of the second proviso giving relief to the assessee(s) [employer(s)] operated only with effect from 1st April, 2004, whereas, according to the assessee(s)-employer(s), the said Finance Act, 2003, to the extent indicated above, operated with effect from 1st April, 1988 [retrospectively].

The lead matter in this batch of civil appeals is Commissioner of Income Tax vs. M/s. Alom Extrusions Limited [civil appeal arising out of S.L.P. (C) No.23851 of 2007].

Prior to the amendment of Section 43-B of the Act, *vide* Finance Act, 2003, the two provisos to Section 43-B of the Act read as under:

> "Provided that nothing contained in this section shall apply in relation to any sum referred to in clause (a) or clause (c) or clause (d) or clause (e) or clause (f), which is actually paid by the assessee on or before the due date applicable in his case for furnishing the return of income under sub-section (1) of section 139 in respect of the previous year in which the liability to pay such sum was incurred as aforesaid and the evidence of such payment is furnished by the assessee along with such return.

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> **Provided further that no deduction shall, in respect of any sum referred to in clause (b), be allowed unless such sum has actually been paid in cash or by issue of a cheque or draft or by any other mode on or before the due date as defined in the *Explanation* below clause (va) of sub-section (1) of section 36, and where such payment has been made otherwise than in cash, the sum has been realized within fifteen days from the due date."**

By Finance Act, 2003, the second proviso to Section 43-B of the Act not only got deleted but the said Finance Act, 2003, also amended the first proviso with effect from Assessment Year 2004-2005. We quote hereinbelow the first proviso to Section 43-B of the Act after its amendment by Finance Act, 2003, which reads as under:

> **"Provided that nothing contained in this section shall apply in relation to any sum which is actually paid by the assessee on or before the due date applicable in his case for furnishing the return of income under sub-section (1) of section 139 in respect of the previous year in which the liability to pay such sum was incurred as aforesaid and the evidence of such payment is furnished by the assessee along with such return."**

To answer the above controversy, we need to understand the Scheme of the Income Tax Act, 1961, as it existed prior to 1st April, 1984, and as it stood after 1st April, 1984.

"Income" has been defined under Section 2(24) of the Act to include profits and gains. Under Section 2(24)(x), any sum received by the assessee from his employees

as contributions to provident fund/superannuation fund or any fund set up under Employees' State Insurance Act, 1948, or any other fund for welfare of such employees constituted income. This is the reason why every assessee(s) [employer(s)] was entitled to deduction even prior to 1st April, 1984, on Merchantile System of Accounting as a business expenditure by making provision in his Books of Accounts in that regard. In other words, if an assessee(s)-employer(s) is maintaining his books on Accrual System of Accounting, even after collecting the contribution from his employee(s) and even without remitting the amount to the Regional Provident Fund Commissioner [R.P.F.C.], the assessee(s) would be entitled to deduction as business expense by merely making a provision to that effect in his Books of Accounts. The same situation arose prior to 1st April, 1984, in the context of assessees collecting sales tax and other indirect taxes from their respective customers and claiming deduction only by making provision in their Books without actually remitting the amount to the exchequer. To curb this practice, Section 43-B was inserted with effect from 1st April, 1984, by which the Merchantile System of Accounting with regard to tax, duty and contribution to welfare funds stood discontinued and, under Section 43-B, it became mandatory for the assessee(s) to account for the afore-stated items not on Merchantile basis but on cash basis. This situation continued between 1st April, 1984, and 1st April, 1988, when the Parliament amended Section 43-B and inserted first proviso to Section 43-B. By this first proviso, it was,

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inter alia, laid down, in the context of any sum payable by the assessee(s) by way of tax, duty, cess or fee, that if an assessee(s) pays such tax, duty, cess or fee even after the closing of the accounting year but before the date of filing of the Return of income under Section 139(1) of the Act, the assessee(s) would be entitled to deduction under Section 43-B on actual payment basis and such deduction would be admissible for the accounting year. This proviso, however, did not apply to the contribution made by the assessee(s) to the labour welfare funds. To this effect, first proviso stood introduced with effect from 1st April, 1988.

Vide **Finance Act, 1988, the second proviso came to be inserted. It reads as follows:**

> **"Provided further that no deduction shall, in respect of any sum referred to in clause (b), be allowed unless such sum has actually been paid during the previous year on or before the due date as defined in the *Explanation* below clause (va) of sub-section (1) of section 36."**

At this stage, we also quote hereinbelow the *Explanation* below clause (va) of sub-section (1) of Section 36:

> **"*Explanation*.-- For 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."**

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However, the second proviso stood further amended *vide* Finance Act, 1989, with effect from 1st April, 1989, which reads as under:

> **"Provided further that no deduction shall, in respect of any sum referred to in clause (b), be allowed unless such sum has actually been paid in cash or by issue of a cheque or draft or by any other mode on or before the due date as defined in the *Explanation* below clause (va) of sub-section (1) of section 36, and where such payment has been made otherwise than in cash, the sum has been realised within fifteen days from the due date."**

On reading the above provisions, it becomes clear that the assessee(s)-employer(s) would be entitled to deduction only if the contribution stands credited on or before the due date given in the Provident Fund Act. However, the second proviso once again created further difficulties. In many of the Companies, financial year ended on 31st March, which did not coincide with the accounting period of R.P.F.C. For example, in many cases, the time to make contribution to R.P.F.C. ended after due date for filing of Returns. Therefore, the industry once again made representation to the Ministry of Finance and, taking cognizance of this difficulty, the Parliament inserted one more amendment *vide* Finance Act, 2003, which, as stated above, came into force with effect from 1st April, 2004. In other words, after 1st April, 2004, two changes were made, namely, deletion of the second proviso and further amendment in the first proviso, quoted above. By the Finance Act, 2003, the amendment made in

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the first proviso equated in terms of the benefit of deduction of tax, duty, cess and fee on the one hand with contributions to Employees' Provident Fund, superannuation fund and other welfare funds on the other. However, the Finance Act, 2003, bringing about this uniformity came into force with effect from 1st April, 2004. Therefore, the argument of the assessee(s) is that the Finance Act, 2003, was curative in nature, it was not amendatory and, therefore, it applied retrospectively from 1st April, 1988, whereas the argument of the Department was that Finance Act, 2003, was amendatory and it applied prospectively, particularly when the Parliament had expressly made the Finance Act, 2003, applicable only with effect from 1st April, 2004. It was also argued on behalf of the Department that even between 1st April, 1988, and 1st April, 2004, Parliament had maintained a clear dichotomy between payment of tax, duty, cess or fee on one hand and payment of contributions to the welfare funds on the other. According to the Department, that dichotomy continued upto 1st April, 2004, hence, looking to this aspect, the Parliament consciously kept that dichotomy alive upto 1st April, 2004, by making Finance Act, 2003, come into force only with effect from 1st April, 2004. Hence, according to the Department, Finance Act, 2003 should be read as amendatory and not as curative [retrospective] with effect from 1st April, 1988.

We find no merit in these civil appeals filed by the Department for the following reasons: firstly, as stated above, Section 43-B [main section], which stood inserted by Finance Act, 1983, with effect from 1st April,

1984, expressly commences with a *non-obstante clause,* the underlying object being to disallow deductions claimed merely by making a Book entry based on Merchantile System of Accounting. At the same time, Section 43-B [main section] made it mandatory for the Department to grant deduction in computing the income under Section 28 in the year in which tax, duty, cess, etc., is actually paid. However, Parliament took cognizance of the fact that accounting year of a company did not always tally with the due dates under the Provident Fund Act, Municipal Corporation Act [octroi] and other Tax laws. Therefore, by way of first proviso, an incentive/relaxation was sought to be given in respect of tax, duty, cess or fee by explicitly stating that if such tax, duty, cess or fee is paid before the date of filing of the Return under the Income Tax Act [due date], the assessee(s) then would be entitled to deduction. However, this relaxation/incentive was restricted only to tax, duty, cess and fee. It did not apply to contributions to labour welfare funds. The reason appears to be that the employer(s) should not sit on the collected contributions and deprive the workmen of the rightful benefits under Social Welfare legislations by delaying payment of contributions to the welfare funds. However, as stated above, the second proviso resulted in implementation problems, which have been mentioned hereinabove, and which resulted in the enactment of Finance Act, 2003, deleting the second proviso and bringing about uniformity in the first proviso by equating tax, duty, cess and fee with contributions to welfare funds. Once this uniformity is brought about in the first

proviso, then, in our view, the Finance Act, 2003, which is made applicable by the Parliament only with effect from 1st April, 2004, would become curative in nature, hence, it would apply retrospectively with effect from 1st April, 1988. Secondly, it may be noted that, in the case of Allied Motors (P) Limited vs. Commissioner of Income Tax, reported in [1997] 224 I.T.R.677, the Scheme of Section 43-B of the Act came to be examined. In that case, the question which arose for determination was, whether sales tax collected by the assessee and paid after the end of the relevant previous year but within the time allowed under the relevant Sales Tax law should be disallowed under Section 43-B of the Act while computing the business income of the previous year? That was a case which related to Assessment Year 1984-1985. The relevant accounting period ended on June 30, 1983. The Income Tax Officer disallowed the deduction claimed by the assessee which was on account of sales tax collected by the assessee for the last quarter of the relevant accounting year. The deduction was disallowed under Section 43-B which, as stated above, was inserted with effect from 1st April, 1984. It is also relevant to note that the first proviso which came into force with effect from 1st April, 1988 was not on the statute book when the assessments were made in the case of Allied Motors (P) Limited (supra). However, the assessee contended that even though the first proviso came to be inserted with effect from 1st April, 1988, it was entitled to the benefit of that proviso because it operated retrospectively from 1st April, 1984, when Section 43-B stood inserted. This is how the

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question of retrospectivity arose in Allied Motors (P) Limited (supra). This Court, in Allied Motors (P) Limited (supra) held that when a proviso is inserted to remedy unintended consequences and to make the section workable, a proviso which supplies an obvious omission in the section and which proviso is required to be read into the section to give the section a reasonable interpretation, it could be read retrospective in operation, particularly to give effect to the section as a whole. Accordingly, this Court, in Allied Motors (P) Limited (supra), held that the first proviso was curative in nature, hence, retrospective in operation with effect from 1st April, 1988. It is important to note once again that, by Finance Act, 2003, not only the second proviso is deleted but even the first proviso is sought to be amended by bringing about an uniformity in tax, duty, cess and fee on the one hand vis-a-vis contributions to welfare funds of employee(s) on the other. This is one more reason why we hold that the Finance Act, 2003, is retrospective in operation. Moreover, the judgement in Allied Motors (P) Limited (supra) is delivered by a Bench of three learned Judges, which is binding on us. Accordingly, we hold that Finance Act, 2003, will operate retrospectively with effect from 1st April, 1988 [when the first proviso stood inserted]. Lastly, we may point out the hardship and the invidious discrimination which would be caused to the assessee(s) if the contention of the Department is to be accepted that Finance Act, 2003, to the above extent, operated prospectively. Take an example – in the present case, the respondents have deposited the contributions with the R.P.F.C. after 31st March [end of accounting year]

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but before filing of the Returns under the Income Tax Act and the date of payment falls after the due date under the Employees' Provident Fund Act, they will be denied deduction for all times. In view of the second proviso, which stood on the statute book at the relevant time, each of such assessee(s) would not be entitled to deduction under Section 43-B of the Act for all times. They would lose the benefit of deduction even in the year of account in which they pay the contributions to the welfare funds, whereas a defaulter, who fails to pay the contribution to the welfare fund right upto 1st April, 2004, and who pays the contribution after 1st April, 2004, would get the benefit of deduction under Section 43-B of the Act. In our view, therefore, Finance Act, 2003, to the extent indicated above, should be read as retrospective. It would, therefore, operate from 1st April, 1988, when the first proviso was introduced. It is true that the Parliament has explicitly stated that Finance Act, 2003, will operate with effect from 1st April, 2004. However, the matter before us involves the principle of construction to be placed on the provisions of Finance Act, 2003.

Before concluding, we extract hereinbelow the relevant observations of this Court in the case of Commissioner of Income Tax, Bangalore vs. J.H. Gotla, reported in [1985] 156 I.T.R. 323, which reads as under:

> **"We should find out the intention from the language used by the Legislature and if strict literal construction leads to an absurd result, i.e., a result not intended to be subserved by the object of the legislation found in the manner indicated before, then if**

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> another construction is possible apart from strict literal construction, then that construction should be preferred to the strict literal construction. Though equity and taxation are often strangers, attempts should be made that these do not remain always so and if a construction results in equity rather than in injustice, then such construction should be preferred to the literal construction."

For the afore-stated reasons, we hold that Finance Act, 2003, to the extent indicated above, is curative in nature, hence, it is retrospective and it would operate with effect from 1st April, 1988 [when the first proviso came to be inserted]. For the above reasons, we find no merit in this batch of civil appeals filed by the Department which are hereby dismissed with no order as to costs.

Civil Appeal No.7755/2009 @ S.L.P. (C) No.20581/2008 and Civil Appeal No.7757/2009 @ S.L.P. (C) No.18380/2009:

Leave granted.

In view of our judgement in the case of Commissioner of Income Tax vs. M/s. Alom Extrusions Limited [civil appeal arising out of S.L.P. (C) No.23851 of 2007], we set aside the impugned judgement and order of the Bombay High Court and allow these civil appeals filed by the assessees with no order as to costs.

.....J.
[S.H. KAPADIA]

.....J.
[H.L. DATTU]

New Delhi,
November 25, 2009.