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This issue contains:

Kind Regards,

Huzaima Bukhari
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Making laws null

by
Huzaima Bukhari & Dr. Ikramul Haq

"*The law was made for one thing alone, for the exploitation of those who don't understand it, or are prevented by naked misery from obeying it*"—**Bertolt Brecht** (1898–1956) **from Laws and the Law**

"*A strong person makes the law and custom null before his own will*"— Ralph Waldo Emerson

Every society, no matter how primitive, tends to regularize its inhabitants by laying down certain rules and laws. This is done essentially to prevent chaos, to better organize day to day affairs and to check disorderly behavior in an attempt to facilitate people in leading a comfortable life. These laws can be laid down by the elders of a tribe, a monarch, a parliament, a government or any other body that is responsible to manage a society. In societies, where there is mayhem, disregard for law of the land, violation of rules, 'might is right' policy and anarchy, soon crumble down; in many cases are over-empowered and enslaved by a stronger entity. Such has been the history of mankind since ancient times. Social scientists view the disruption of a society from a cultural stand point. In his book, *The Chaotic Society: Product of the Social Morphological Revolution,* Philip M. Hauser has attributed societal disorder to dissonance and discord among the various cultural strata, each of which tends to persist beyond the set of conditions, physical and social, which generated it. A political scientist would have a more fundamental approach regarding progress of and degeneration of societies, placing more emphasis on methods of governance and economic systems that are considered vital components for endurance. No matter what, the underlying cause remains defiance of the rule of law that eventually leads to destruction.

On a small scale or at the lowest stratum of society, such defiance may not have that great an impact compared to non-compliance at the highest level—where law-makers themselves become law-violators. In such circumstances where legislators, governors and enforcers set precedence of rebelling against their own formulated rules, it would be unjust in asking the citizens to observe the same with religious zeal. This means that in order to secure allegiance to law from others it is important for administrators to strictly abide by regulations, setting example for the rest to follow.

As in Pakistan, where they deliberately wriggle out from legalities or bypass rules on account of their authority status—a simple example would be breaking a queue at a public place—observers naturally tend to either find connections (nepotism) or go onto show disrespect by playing havoc with the law and order.

The most burning issue of non-compliance of tax obligations in Pakistan confirms how our lawmakers violate law of the land with impunity. They either do not file tax returns or grossly understate their incomes. Another glaring example is that of the traffic police who shamelessly defy one-ways and other traffic rules when on normal patrol. No doubt that those providing essential services like ambulances, fire engines or traffic-sergeants-in-pursuit are allowed to ignore rules but certainly not under normal conditions wherein they are supposed to show the same standard of care as expected from other commuters. After all, they are the ones whose acts are being closely scrutinized by those who follow in their footsteps to break laws creating life-threatening situations for themselves as well as their fellow travelers. Frankly speaking, the real culprits remain unpunished because of which lawlessness prevails in the streets of our country. The ones in authority conveniently implicate the weaker segments who are unable to exert either money power or a suitable recommendation (*sifarish*) from a higher-up. Amid this confusion, perpetrators go scot free.

Traffic wardens are just executors i.e. they are responsible for enforcing the law made by the legislators sitting in the Parliaments. However, the real problem arises where defiance for the law of the land sprouts from the parliamentarians themselves. The public closely views such blatancy and is right to discern that rules are made for the sole purpose of subjugating the common man while the ruling elite considers itself above all laws. Such high-handedness is termed dictatorship if demonstrated by one man but what name, other than anarchy, can be given in a case where sitting parliaments, the entire bureaucratic structure and every henchman connected to those in power is bent upon infringing regulations for own vested-interest. To make matters worse, the courts are too over-worked to provide prompt justice. The occasional episodes of resurrection appear only when the electronic media creates a hype whereby judges feel obliged to take immediate action to save their faces otherwise there are an infinite number of people who have reached their graves in search of justice and fair play.

Stringent efforts of law enforcers are perished on the precipice of shameless defiance by their chiefs. When they show lack of respect for their subordinates and for rules, the people too do not abstain from the same behavior. Thus if the chief minister of a province publically humiliates a civil servant (only to gain cheap popularity), the man on the road gets the cue to slap a warden; when roads leading to own home and homes of the many in-laws of the head of a province are blocked in utter disregard for inconvenience caused to the neighbours and other commuters, the common man also learns to abuse public space for receptions, making sub-standard speed breakers or even mixing mortar for construction work. All over the world, blocking thoroughfares (unless for emergencies/untoward circumstances) is considered a major blow to the civic sense and commuting rights of the citizen. In Lahore Pakistan, public roads fall within the ambit of "controlled area" under the

jurisdiction of Lahore Development Authority (LDA) Act, 1975. Unless prohibited by the government through some notification, no public road or passage can be blocked by anyone.

Unfortunately, despite the existence of this provision, a number of areas suffer from unauthorized blockade forcing citizens to veer around or travel a longer distance to reach their destinations. Strangely, the movement of these so-called public servants is accompanied with much fanfare and high security, yet they need many meters of road blocks to secure their entrances from innocent passers-by. Following in the footsteps of their leaders, even lower ranked ministers and parliamentarians also insist on creating obstructions around their homes causing inexplicable inconvenience to those living in their vicinity—on many occasions their guests are subjected to embarrassment at the hands of quizzical sentries posted at these check posts. Surprisingly, these tactics have failed to protect the lives of so many politicians and officers who fell victims to acts of terrorism. On the one hand, we claim as Muslims to believe that every living being will face death on its appointed time and on the other we do our best to surround ourselves with human shields as if we can keep the angel of death away. In the words of Mirza Ghalib:

Maut ka aik din moayyan hai
Neend kyun raat bhar nahi aati?

[When death is destined for a particular day, why suffer from insomnia every night?]

The dilemma of Pakistan's society in general is that we keep on grumbling about various issues but fail to appreciate that in reality, we ourselves are responsible for the deteriorating state of affairs. Non-observance of laws has become our national character for which we seem to take immense pride setting bad precedence, both for the public and our younger generation. We derive tremendous pleasure from infringing other people's rights to satisfy our egocentric desires, not realizing that such behavior and attitude can invoke rebellious germs within human beings leading to extremely destructive ends. As conscious citizens of this country our dream is to see a better Pakistan and a more responsible society, catering to the needs of its people, setting good examples for its future generations, securing for its people their rights and enforcing rule of law. Such a scenario might remain an unrealized dream, if the present state of legal rapaciousness continues unabated.

Argentina

Argentina imposes withholding tax on exports

Through resolution No 3,577, the Argentine tax authority (AFIP) has introduced a 0.5 percent withholding tax on exports in "triangular operations" made on or after January 7, 2014. An additional withholding tax of 1.5 percent will be applicable for exports to low-tax jurisdictions.

The tax will be imposed solely for transactions where the country of physical destination is different from the country shown in the invoice. In other words, the tax will apply only if there is an intermediary that is not the final recipient. AFIP's objective is to deter certain transfer pricing practices where a fictitious intermediary buys the goods for a low price, and then resells them for a higher price. The only way to avoid the withholding tax is to make sure the goods are actually shipped to the country wherein the intermediary is established.

The withholding tax will normally be collected from the exporter as the goods are processed by the Argentine customs authority. It should merely serve as an advance corporation tax payment, which creates a cash flow disadvantage for the Argentine taxpayer. Given that Argentina generally has double-digit inflation rates, one would expect the tax to be quite punitive.

It should be noted that only "definitive exports for consumption" are covered. Special regimes, such as temporary admission, therefore remain excluded.

This new mechanism is expected to reduce the risk of tax evasion and improve tax collection, despite being unconventional by international standards. This tax is without prejudice to AFIP's ability to adjust prices under general transfer pricing legislation. – *Courtesy tax-news.com*

Bulgaria

Bulgaria court to consider tax on renewable energy producers

Bulgaria's Constitutional Court is to consider whether a new 20 percent tax on renewable energy producers is unconstitutional, after Prime Minister Rosen Plevneliev fulfilled his promise to lodge a legal challenge.

The Ministry of Economy and Energy said in December that producers of renewable energy had enjoyed a preferential tax regime due to the risks of investing in new technology, but that this was no longer necessary. However, Plevneliev argued that the tax would damage the business environment, put off foreign investors, and contravene constitutional principles of free enterprise. Plevneliev also complained that the tax was being introduced without transparency.

News of Plevneliev's move provoked criticisms from the Socialists and a threat of strike action by miners.

Plevneliev became President in 2011 as a candidate of the center-right GERB party, while the current Prime Minister, Plamen Oresharski, is an independent technocrat backed by the Socialist Party. The tax on renewable energy was put forward by Volen Siderov, who heads the nationalist Ataka party, and 116 out of 182 Bulgarian MPs voted in favor of imposing the hike.

The post of President in Bulgaria carries little real power, but Plevneliev said that referring the tax to the court was his "democratic right." – *Courtesy tax-news.com*

China

China simplifies export tax exemption for e-commerce

China's State Administration of Taxation and the Ministry of Finance have issued a joint circular that specifies the simplified conditions under which, from January 1, 2014, e-commerce exporters can receive an export tax exemption or refund.

For example, to benefit from the tax break, businesses need to have been granted the exemption by the relevant tax authority, and to be general value added tax payers. The e-commerce exporter will need to have obtained an export declaration form, but only for export tax exemption purposes.

It is hoped that the new regulations will encourage a further increase in China's cross-border e-commerce. Currently, with e-commerce often involving large quantities of small value items, businesses are unable to access tax rebates without incurring uneconomical costs.

According to official statistics, the value of Chinese cross-border e-commerce grew by 25 percent from RMB1.6 trillion (USD265 billion) in 2011 to RMB2 trillion in 2012, as is expected to have

shown a further 30 percent increase last year. It has been predicted that its total value will reach RMB6.4 trillion in 2016, when it would account for 18.5 percent of the value of China's total international trade. – *Courtesy tax-news.com*

LG polls: LHC takes up plea for implementing Articles 62, 63

Justice Aminuddin Khan of the Lahore High Court (LHC) on Monday issued notice to the Election Commission of Pakistan, Federal Board of Revenue, National Accountability Bureau, Federal Investigation Agency and inspector general of Punjab Police on a petition seeking implementation of constitutional provisions 62 and 63 on candidates for local government (LG) polls like in general elections.

The judge sought replies from the respondents in the last week of January. A lawyer, Munir Ahmad, had moved the petition.

The petitioner's counsel, Muhammad Azhar Siddique, submitted that the constitution laid down criteria of qualification/disqualification for the election of public representatives in articles 62 and 63. He said that the newly promulgated Punjab Local Government Act 2013 contained no such criteria for the candidates; thus allowing the convicted, bank defaulters, dual nationals and fake degree holders to contest LG polls.

He said that "highly sensible, educated and qualified persons" were required to be elected.

"A union councillor also has to act as an arbitrator in family matters while dealing with divorce related disputes and if an uneducated and unqualified person is elected, how could he be able to dispense justice?"

He submitted that in the interest of justice and fair play it was necessary to implement articles 62 and 63.

He said that even otherwise there was need for specifying instructions, rules and regulations for laying down the mode and manner for determination of qualification or disqualification criteria of LG candidates.

He requested the court to summon details of qualified and disqualified candidates for LG elections such as details of their income tax, sales tax, agricultural tax, professional tax and degree record.

He said that the Election Commission and government of Punjab have failed to fulfil these requirements and, therefore, the court should summon IGP, FIA DG, NAB chairman and FBR to ensure that no tax defaulter, fake degree holder or a criminal could take part in LG elections.

He also requested that the federal government should be asked to explain what instructions, if any, had been relayed to returning officers for determining a candidate's viability. In particular, he said, it should say whether fake degree holders, loan defaulters, tax evaders and dual nationals would be barred from contesting elections. – *Courtesy Pak Tribune*

Notice to ECP, NAB on LG polls eligibility criteria

The Lahore High Court on Monday issued notice to the Election Commission, the Federal Board of Revenue, the National Accountability Bureau, the IG Police and the Federal Investigation Agency for last week of February, on a petition questioning the eligibility criteria for candidates in local bodies (LB) elections.

The petitioner-lawyer had requested the court to summon the details of qualified and disqualified candidates for local bodies (LB) elections with details of income tax, sales tax, agricultural tax, customs duties, professional tax, fake degree holders, criminals and convicts as returning officers had failed to obtain these details and papers of candidates deserved to be disqualified stood qualified.

He said the election commission and the Punjab government had failed to fulfill these requirements, therefore, the court should summon the IGP, the DG FIA, the NAB chairman and the FBR in this regard to ensure that no tax defaulter, fake degree holder or someone having criminal record could take part in these elections.

The petitioner also asked the court to direct the Election Commission of Pakistan to make sure that Article 62, which outlines the qualifications of a candidate standing for election to the Parliament must have and Article 63 which outlines possible reasons for disqualifying a candidate, are applied to local election (LB) candidates.

The petitioner also asked the court to direct the federal government to explain what instructions, if any, had been relayed to returning officers for determining a candidate's viability. In particular, he said, it should say whether fake degrees holders, loan defaulters, tax evaders and dual nationals would be barred from running.

Ahmed said that Article 62 required a candidate to be one who is not commonly known to violate Islamic injunctions; who has

knowledge of Islamic teaching and practices; abstains from major sins; and is sagacious, righteous, non-profligate, honest and Ameen. – *Courtesy International The News*

12 known tax defaulters come back into parliament

At least 12 such lawmakers have returned to the National Assembly who turned out to be consistent tax defaulters as neither had they filed tax returns in 2011 nor in 2012 and seven of them belong to PML-N, FBR record reveals.

The former State Minister for Law, Justice and Parliamentary Affairs, Barrister Raza Hayat Harraj, is prominent among them. The Lahore High Court had ordered Federal Board of Revenue (FBR) to upload the list of all tax defaulters who contested elections; an order issued in April 2013 but was never implemented.

A guideline sent to district returning officers by the FBR at the time of filing nomination papers declared that whoever found to have not filed tax return is a tax defaulter. There are around 100 MNAs who have returned to the assembly. As many as 235 tax defaulters were spotted in last national assembly (2008-13), according an earlier report "Taxation without Representation" on the 2011 taxes of lawmakers. Some of them later started filing tax returns after this expose; however, 12 of them who also managed to return to the assembly have persisted in this malpractice of non-compliance of tax laws even in 2012.

These defaulters include seven names of PML-N MNAs: Raza Hayat Harraj, Akram Ansari, Junaid Anwaar Chaudhry, Shahnaz Saleem Malik, Tahira Aurangzeb, Nighat Parveen and Dr Ramesh Kumar Vankwani. Two consistent tax defaulters belong to MQM: Abdul Waseem and Iqbal Qadri.

Two returning MNAs from Fata fall in this category: Bilal Rehman and Sajid Hussain Turi. One such MNA is affiliated with Awami Jamhuri Ittehad, Pakistan: Usman Khan Tarakai. There are another four returning MNAs who filed tax returns in 2011 but turned out to be defaulter in 2012, and all of them belong to the PML-N. Included among them are: National Assembly Speaker Sardar Ayaz Sadiq, State Minister for Water and Power Abid Sher Ali, State Minister for Information Technology Anusha Rehman and Waseem Akhtar Sheikh.

Four lawmakers who returned to the National Assembly were non-filer in 2011 but complied with tax laws in 2012 by filing tax returns. Two of them belong to PML-N: Mehmood Bashir Virk and Shakir Bashir Awan. Third MNA bracketed with them contested last election from PML-N platform but elected this time from PTI ticket: Makhdoom Javed Hashmi. PML leader, Ch Pervaiz Elahi is also included in the list. He had earlier issued clarification claiming he filed tax returns in 2011 but FBR record contradicts this claim.

As many as six MNAs have been identified as tax defaulter for year 2010. Four of them are from the PPPP including Dr Azra Fazal Pechuho, Faryal Talpur, Dr Fehmida Mirza and Munawar Talpur. Former Federal Minister for Overseas Pakistanis Dr Farooq Sattar and incumbent Pir Sadarud Din Shah also did not file tax returns in 2010.

Our study had found 461 (47%) lawmakers in national and provincial assemblies who, according to the FBR guideline, fall in the category of tax defaulters as they didn't file tax returns in 2012. There are another 84 lawmakers who claimed paying income tax, but the FBR record out-rightly rejected it, meaning thereby they did not file tax returns as well. Including them would swell figure of tax defaulters to 545 (54%) lawmakers. Record of 54 members was not available for examination that could raise the number further.

Over 23,900 candidates submitted nomination papers and majority of them were tax defaulters; however, the FBR lost a golden opportunity to name and shame them quoting the LHC order. It showed reluctance to enforce the tax regime.

The Lahore High Court had ordered the FBR to add two columns of information sent to the ECP in order to include the candidates who are tax defaulters and nature of their default. It reads: "On our query, the Intelligence director, Federal Board of Revenue, states that it would be possible to create another column …indicating if there is default in case of a particular candidate and the nature of such default."

The judgment goes on: "The aforesaid exercise will be completed within a period of 3 weeks…Such information shall be made available on the websites of the FBR as well as of ECP." Neither the directed information was passed on to the ECP, nor displayed on the website. – *Courtesy International The News*

Textile lining material: new customs value fixed

Directorate General of Customs Valuation Karachi has fixed $3 per kg as new customs value on import of textille lining material from China It is learnt here on Monday that the directorate has issued a new valuation, which has superseded Valuation Ruling No 483/2012. According to the ruling, the customs value of textile lining material was earlier determined vide Valuation Ruling No 483/2012, dated 25-10-2012.

Various representations were received, including representations made by KCC&I regarding revision of Customs value of the said goods to reflect the current price trend of these goods in the international market. This prompted an exercise to re-determine Customs value of Textile Lining Material under Section 25A of the Customs Act, 1969.

The valuation methods given in Section 25 of the Customs Act, 1969 were followed. Transaction value method provided in Sub-Section (1) of Section 25 was found inapplicable because requisite information as per law was not available. Identical / similar goods value methods provided in Sub-Sections (5) & (6) of Section 25 of the Act ibid were examined for applicability to the valuation issue in the instant case. These methods furnished unreliable values and were not found applicable. Deductive Value Method under Sub-Section (7) of Section 25 was, therefore, adopted to determine customs values for Textile Lining Material in this case read with Sub-Section (9) ibid. Meetings were held with the stakeholders and attended by representatives of FPCC&I and KCC&I who provided feedback regarding the valuation of subject goods.

In cases where declared/transaction values are higher than the Customs value determined in the Ruling, the assessing officers shall apply those values in terms of Sub-Section (1) of Section 25 of the Customs Act, 1969. In case of consignments imported by air, the assessing officer shall take into account the differential between air freight and sea freight while applying the Customs value determined in the ruling.

The value determined vide this Ruling shall be the applicable Customs value for assessment of subject imported goods until and unless it is rescinded or revised by the competent authority in terms of Sub-Section (1) or (3) of Section 25-A of the Customs Act, 1969. The Collectors of Customs may kindly ensure that the value given in the Ruling be applied by the concerned staff without fail, it added. – *Courtesy Business Recorder*

New approval awaited: Customs stops clearance of 1,000 imported vehicles

Some 1,000 of imported vehicles are stuck at port as Pakistan Customs has stopped clearance of model 2009 vehicles since November 2013. Sources told on Monday that these vehicles have been imported under the scheme of personal baggage, gift and transfer of residence and government can collect a revenue of about Rs 3 billion by releasing these vehicles.

In February last year, the ministry of commerce through an office order allowed the release of such vehicles that were few months older than the prescribed age limit of 3 years. "Considering the hardship faced by the importers of vehicles under the schemes of personal baggage, gift and transfer of residence, where the imported vehicle is only a few months older than prescribed age limit of 3-year, it has been decided to allow release of such vehicles against a surcharge levied by the Customs in whose jurisdiction the vehicles was imported on Cost and Freight (C&F) basis," said an office memorandum issued on February 25, 2013 by the ministry of commerce.

The delay in shipment of vehicles older than 3 year and 8 months shall be condoned if not in excess of 30 days against a surcharge at 5 percent per fortnight of C&F value, it added. The memorandum also said that the EGM and cargo vessel leaving the port of export may be considered with reference to cut-off date.

Following this memorandum, the customs authorities were releasing the above age limit imported vehicles at minimum surcharge of 5 percent and maximum 13 percent during February to October 2013 and few thousands cars were cleared during the period. However, in November 2013, the customs suddenly stopped clearance of imported vehicles of 2009 model declaring the import of above 3-year vehicles illegal. According to customs authorities, the memorandum was for a specific time period and only for those vehicles shipment of which was delayed after the government's decision to reduce the age limit. The federal government had reduced the age limit of imported cars from 5 to 3 year in December 2012 aimed to support the domestic automobile industry.

Customs officials claimed that interpretation of that memorandum was incorrect that created a crisis like situation and now vehicles of 2009 model will be released after a new approval from ministry of commerce. Presently, the customs has completely stopped the

clearance of imported vehicles of 2009 model and seeking a clarification from the ministry for release of these vehicles, source said.

"We are not sure about the actual units but around 1,000 imported vehicles are stuck at port as customs has refused to clear these vehicles without any new directives from the ministry or Federal Board of Revenue (FBR)", they added. Sources said that some Rs 4-5 billion investment of overseas Pakistanis has been blocked due to non-clearance of these vehicles, while the government is also suffering billions of rupees loss on account of revenue.

The cost of these vehicles is also increasing as now the importers will be required to pay millions of rupees demurrages, imposed by the port authorities. These vehicles are lying at ports from last three to four months and importers have to pay approximately Rs 100 million on account of demurrages to the port authorities. Sources said that import of used cars is generating billion of rupees revenue for government as there is some 100 percent duty on import of vehicles. The federal government has collected about Rs 35 billion revenue during FY12, when age limit was up to 5-year. While some Rs 12 billion were received on account of import duty during FY13, as in December 2012 government had reduced the age limit of imported cars up to 3-year. – *Courtesy Business Recorder*

FBR to make public details of 0.85 million filers

The Federal Board of Revenue (FBR) has decided to make public tax details (annual income and tax paid) of all 0.85 million taxpayers in a tax directory to be published till March 31, 2014. Sources told here on Monday that Pakistan would become the fourth country in the world to publish tax particulars of all its registered taxpayers.

The information would cover all categories of taxpayers including leading taxpayers, businessmen, service providers, prominent players, artists, public/private sector employees and all other income tax return filers. The private and confidential information of taxpayers, who are regular income tax return filers, would be made public by the FBR. So far, the FBR has decided to disclose declared income and tax payments of the registered persons excluding assets. The Board has yet not decided to disclose details of the moveable and immovable assets declared in the income tax

returns and wealth statements. However, tax payments would be made public in line with the directions of the Ministry of Finance.

It would not be appropriate to disclose the details of the assets of the registered taxpayers. Therefore, assets details like properties, vehicles, cash, bonds/stocks and information of other assets would not be made public. Referring to sub-section 5 and 6 of the section 216 of the Income Tax Ordinance 2001, official said that FBR is legally empowered to publish tax directory containing information of tax payments of the taxpayers. According to sub-section 5 of the section 216 of the Income Tax Ordinance 2001, 'nothing contained in sub-section (1) shall prevent the Board from publishing, with the prior approval of the Federal Government, any such particulars as are referred to in that sub-section.

As per sub-section 6 of the section 216 of the Income Tax Ordinance 2001, 'nothing contained in sub-section (1) shall prevent the Federal Government from publishing particulars and the amount of tax paid by a holder of a public office as defined in the National Accountability Bureau Ordinance, 1999'.

Finance Minister Ishaq Dar has reportedly informed Senate that FBR has been directed to ensure issuance of National Tax Numbers (NTNs) to parliamentarians by January 31. Last date to file tax returns was December 16, 2013 and now after issuance of NTN the tax details of all MPs would be made public by February 15, 2014. In the first phase, tax details of parliamentarians would be made public and in the next phase tax details of all taxpayers would be published within two months, Ishaq Dar added. – *Courtesy Business Recorder*

Import of milk preparations for infant: massive underinvoicing unearthed

The Federal Board of Revenue has unearthed underinvoicing on the import of milk preparations for infant from European and Far Eastern countries, causing revenue loss to the exchequer. Sources told here on Monday that the Directorate General of Customs Valuation Karachi has revised customs values on the import of milk preparations for infant under Section 25A of the Customs Act, 1969.

It was brought to the notice of Directorate General of Customs Valuation by field formations that Milk Preparations for Infant Use are being imported at under-invoiced values, causing loss of

revenue to Government exchequer. This prompted an exercise to determine the fair Customs values for imported Milk Preparations for Infant Use.

The Valuation methods given in Section 25 of the Customs Act, 1969 were followed. The transaction value method under Sub-Section (1) of Section 25 ibid was found inapplicable because of non-availability of sufficient information. Identical/similar goods valuation methods provided in Sub-Sections (5) & (6) of Section 25 ibid furnished unreliable values. Deductive Value Method under Sub- Section (7) read with Sub-Section (9) of Section 25 of the Customs Act, 1969, was applied to arrive at the customs values. Meetings were held with the stakeholders including representatives of FPCCI & KCCI to obtain stakeholders views on valuation of milk preparations for infant.

In cases where declared/transaction values are higher than the customs value determined in this ruling, the assessing officers shall apply those values in terms of Sub-Section (1) of Section 25 of the Customs Act, 1969. In case of consignments imported by air, the assessing officer shall take into account the differential between air freight and sea freight while applying the customs values determined in the ruling.

The value determined vide this ruling shall be the applicable customs value for assessment of subject imported goods until and unless it is rescinded or revised by the competent authority in terms of Sub-Section (1) or (3) of Section 25-A of the Customs Act, 1969. – *Courtesy Business Recorder*

S.R.O. 17(I)/2014, Islamabad, the 7th January, 2014.– In exercise of the powers conferred by sub-section (2) of section 53 of the Income Tax Ordinance, 2001 (XLIX of 2001), the Federal Government is pleased to direct that the following further amendment shall be made in the Second Schedule to the said Ordinance, namely:–

In the aforesaid Schedule, in Part IV, after clause (88), the following new clauses shall be added, namely:–

"(89) The provisions of section 236I shall no apply to-

(a) the Federal Government or a Provincial Government;

(b) an individual entitled to privileges under the United Nations (Privileges and Immunities) Act, 1948 (XX of 1948);

(c) a foreign diplomat or diplomatic mission in Pakistan; or

(d) a person who is a non-resident and-

(i) furnishes copy of passport as an evidence to the educational institution that during previous tax year, his stay in Pakistan was less than one hundred eighty-three days;

(ii) furnishes a certificate that the he has no Pakistan-source income; and

(iii) fee is remitted directly from abroad through normal banking channels to the bank account of the educational institution.

(90) The provisions of section 236D shall not apply to-

(a) the Federal Government or a Provincial Government;

(b) an individual entitled to privileges under the United Nations (Privileges and Immunities) Act, 1948 (XX of 1948); or

(c) a foreign diplomat or a diplomatic mission in Pakistan."

2014 TRI 84 (H.C. Guj.)

HIGH COURT OF GUJARAT AT AHMEDABAD

M.R. Shah and R.P. Dholaria, JJ.

Commissioner of Income Tax II
v.
Gujarat State Road Transport Corporation

FACTS/HELD

Employees' PF/ ESI Contribution is not covered by s. 43B & is only allowable as a deduction u/s 36(1)(va) if paid by the "due date" prescribed therein

1. In AY 2005-06 the assessee collected Rs.51 crore from its employees as their contribution to the provident fund but deposited an amount of Rs.21 crore with the provident fund trust within the time allowed under the Provident Fund Act. The shortfall was deposited with the PF trust before the due date for filing the ROI u/s 139(1). The AO held that the amount not deposited in time was assessable as "income" u/s 2(24)(x) & that a deduction u/s 36(1)(va) could not be allowed as the payment was not within the prescribed "due date". He also held that s. 43B applied only to the employer's contribution. On appeal by the assessee, the CIT(A) and ITAT upheld the assessee's claim by relying on Alom Extrusions Ltd 319 ITR 306 (SC). On appeal by the department to the High Court HELD allowing the appeal:

> S. 43B which permits a deduction for payments made upto the due date for filing the ROI applies only to the employer's contribution to the provident fund etc. It does not apply to the employees' contribution. The employees' contribution received by the employer-assessee is deemed to be income in the assessee's hands u/s 2(24)(x) and if the assessee has not credited the said sum to the employees' account in the relevant fund or funds on or before the due date mentioned in Explanation to s. 36(1)(va), the assessee shall not be entitled to deductions of such amount in computing the income referred to in s.

28 of the Act. The argument that two view are possible is not acceptable because only one view is possible on a correct interpretation of the provision (Alom Extrusions 319 ITR 306 (SC) distinguished, Aimil Ltd 321 ITR 508 (Del), Nipso Polyfabriks 350 ITR 327 (HP), Spectrum Consultants 34 taxmann.com 20 (Kar), Udaipur Dugdh Utpadak Sahakari Sandh 35 taxmann.com 616 (Raj) & Hemla Embroidery Mills (P&H) dissented.

Appeals allowed.

Tax Appeal No. 637 of 2013 with Tax Appeal Nos. 1711, 2577 of 2009, 925, 949, 965, 1655, 2365, 2378, 2644 of 2010 and 814 of 2011.

Decided on: 26th December, 2013.

Present at hearing: Manish R. Bhatt, Sr. Advocate with Mauna M. Bhatt, Advocate, for Appellant. Deepak Shah, Advocate, for Respondent in Tax Appeal No. 637 of 2013. NR KM Parikh, Advocate, for Appellant in Tax Appeal No. 1711 of 2009. Paurami B. Sheth, Advocate, for Appellant. Manish J. Shah, Advocate, for Respondent in Tax Appeal No. 2577 of 2009. Manish R. Bhatt, Sr. Advocate with Mauna M. Bhatt, Advocate, for Appellant. Manish J. Shah, Advocate, Advocate, for Respondent in Tax Appeal No. 925 of 2010. Manish R. Bhatt, Sr. Advocate with Mauna M. Bhatt, Advocate, for Appellant in Tax Appeal No. 949 & 965 of 2010. Sudhir M. Mehta, Advocate, for Appellant. Manish J. Shah, Advocate, for Respondent in Tax Appeal No. 1655 of 2010. Paurami B. Sheth, Advocate, for Appellant. Manish J. Shah, Advocate, for Respondent in Tax Appeal No. 2365 of 2010. Paurami B. Sheth, Advocate, for Appellant in Tax Appeal No. 2378 & 2644 of 2010. Manish R. Bhatt, Sr. Advocate with Mauna M. Bhatt, Advocate, for Appellant in Tax Appeal No. 814 of 2011.

JUDGMENT

Per M.R. Shah, J.–

1.00. As common question of facts and law arise in this group of appeals, they are disposed of by this common judgement.

2.00. Common substantial question of law which arises in this group of appeals is with respect to deletion of disallowance of employees' contribution to PF Account as well as ESI contribution despite provisions of section 36(1)(va) of the Income Tax Act, 1961. (hereinafter referred to as "the IT Act" for short).

3.00. For the sake of convenience facts of Tax Appeal No.637 of 2013 are narrated which in nutshell are as under:

3.01. That the respondent – assessee is a Corporation run by State of Gujarat, engaged in the business of public transportation. The assessee

filed their return of income declaring total loss of Rs.35,51,88,507/- on 30/10/2005 for the AY 2005-06. That the return was processed under section 143(1) of the IT Act. That the assessee filed revised return of income on 31/12/2006 declaring total loss of Rs.93,16,88,230/- on the basis of the final audited accounts and auditor report under section 44AB of the IT Act (Revised) after considering the observations / comments of the Statutory Auditor i.e. Accountant Journal.

3.02. That the case was selected for scrutiny and notice under section 143(2) of the IT Act dtd. 21/6/2006 was issued and served upon the assessee on 22/6/2006. That thereafter notice under section 142(1) of the IT Act dtd. 22/5/2007 was issued and served upon the assessee on 23/6/2007. It appears that there was no compliance from the assessee to the said notice and therefore, further notices under section 143(2) of the IT Act and under section 142(1) of the IT Act requiring the assessee to furnish the details were issued on 19/10/2007 and served upon the assessee on 22/10/2007. In response to the same, the Account Officer of the assessee along with its Chartered Accountant attended and submitted submissions vide letters dated 4/6/2007 and 2/11/2007. The Account Officer submitted chart showing provident fund contribution collected from the employees and deposited with PF Trust as well as Corporation's contribution towards contributory provident fund and its deposit with the PF Trust. That on verification of the same, it was found that there was shortfall in remittance of provident fund collected from the employees which was required to be treated as income of the assessee as per the provisions contained in section 2(24)(x) read with section 36(1) (va) of the IT Act. There was also shortfall in the fund of remittance of assessee Corporation, which according to the Assessing Officer was required to be disallowed under section 43B of the IT Act.

3.03. It was found that the assessee Corporation collected amount of Rs.51,06,02,712/- from its employees but it has deposited an amount of Rs.21,16,61,582/- with provident fund trust. Thus, there was shortfall of Rs.24,89,41,130/-. The Assessing Officer treated the aforesaid amount of Rs.24,89,41,130/- as income of the assessee Corporation considering section 2(24)(x) read with section 36(1) (va) of the IT Act while passing final assessment order.

3.04. The Assessing Officer also added amount of Rs.1,93,55,580/- being the amount of shortfall towards the employers' contributory provident fund and therefore disallowed the same under section 43B of the IT Act and disallowed the said amount of Rs.1,93,55,580/- from the expenses claimed by the assessee Corporation for the year under consideration, as per the provisions contained in section 43B of the IT Act.

3.05. Thereafter, being aggrieved by and dissatisfied with the Assessment Order passed by the Assessing Officer in making addition of Rs. Rs.24,89,41,130/- by invoking provisions of section 2(24)(x) read with

section 36(1) (va) of the IT Act being shortfall in employees' contribution to the provident fund and in making total disallowance of Rs.1,93,55,580/- being shortfall in employers' contribution to the provident fund, the assessee preferred an appeal before the CIT(A) and the learned CIT(A) by order dtd. 25/6/2009 partly allowed the said appeal and directed to delete disallowance of Rs.24,89,41,130/- (shortfall in employees' contribution to PF Account) and Rs.1,93,55,580/- (shortfall in employers' contribution to PF Account), by observing that employees' contribution / employer's contribution was deposited before the filing of the return under section 139(1) of the IT Act for the relevant period.

3.06. Being aggrieved by and dissatisfied with the order passed by the CIT(A) in deleting disallowance of Rs.24,89,41,130/- being shortfall in employees' contribution to PF Account and Rs.1,93,55,580/- being shortfall in employers' contribution to PF Account, the revenue preferred appeal before the ITAT being ITA No.2785/Ahd/2009. That the learned ITAT by the impugned Judgement and Order, relying upon the decision of the Hon'ble Supreme Court in the case of *Commissioner of Income-Tax vs. Alom Extrusions Ltd.*, reported in [2009] 319 ITR 306 (SC), has dismissed the said appeal confirming the order passed by the CIT(A) deleting disallowance of short fall in employees' contribution and employers' contribution to PF Account.

3.07. Being aggrieved by and dissatisfied with the Judgement and Order passed by the ITAT in deleting disallowance of Rs.24,89,41,130/- being shortfall in employees' contribution to PF Account, the appellant revenue has preferred Tax Appeal No.637 of 2013.

3.08. In Tax Appeal Nos.637/2013; 1711/2009; 925/2010; 949/2010; 2365/2010; 2644/2010 and 814/2011, the issue is with respect to disallowance of shortfall of employees' contribution to PF Account under section 36(1) (va) of the IT Act and in Tax Appeal Nos.2577/2009; 965/2010 and 1655/2010, the issue is with respect to shortfall in employees' contribution as well as ESI contribution and in Tax Appeal No.2378/2010, the issue is with respect to shortfall in ESI contribution only.

4.00. Mr.Manish Bhatt, learned counsel has appeared on behalf of the revenue with Mr.K.M. Parikh and Ms.Paurami Sheth, and Mr.Sudhir Mehta and Mr.S.N. Soparkar, learned counsel has appeared on behalf of the assessee. Mr.Manish J. Shah and Mr.Dipak Shah, learned advocates have also appeared on behalf of the respective assessees.

4.01. On behalf of the revenue, Mr.Manish Bhatt, learned counsel has made submissions and on behalf of the assessee, Mr.S.N. Soparkar, learned counsel has made submissions and Mr.Manish J. Shah and Mr.Dipak Shah, learned advocates have adopted the submissions made by Mr.S.N. Soparkar, learned counsel appearing on behalf of the assessee.

4.02. Mr.Manish Bhatt, learned counsel appearing on behalf of the revenue has vehemently submitted that the learned tribunal has materially erred in relying upon the decision of the Hon'ble Supreme Court in the case of *Commissioner of Income-Tax vs. Alom Extrusions Ltd.*, reported in [2009] 319 ITR 306 SC. It is submitted that as such before the Hon'ble Supreme Court in the case of Alom Extrusions (supra) the issue involved was with respect to employer's contribution to PF Account whereas in the present cases, the issue involved is with respect to employees' contribution to PF Account. It is submitted that as such under the Income Tax Act provisions with respect to employees' contribution to PF Account and employers' contribution to PF Account are different. It is submitted that as such with respect to employers contribution, section 43B of the IT Act would be applicable. However, with respect to employees' contribution, section 36(1) (va) of the IT Act would be applicable. It is submitted that both the provisions i.e. section 43B and section 36(1) (va) of the IT Act are different and distinct and will operate in different situation and with respect to different contributions and therefore, the provision applicable with respect to section 43B cannot be made applicable with respect to section 36(1) (va) of the IT Act. It is, therefore, submitted that the learned appellate tribunal has materially erred in relying upon the decision of the Hon'ble Supreme Court in the case of Alom Extrusions Ltd. (supra).

4.03. Mr.Manish Bhatt, learned counsel appearing on behalf of the revenue has further submitted that as per the definition of "Income" provided under section 2(24)(x), any sum received by the assessee from his employees as contribution to any provident fund or superannuation fund or any fund set up under the provisions of Employees State Insurance Act or any other fund for the welfare of such employees is required to be included in the income of the assessee.

4.04. Mr.Manish Bhatt, learned counsel appearing on behalf of the revenue has further submitted that as per the provisions of section 36(1)(va) with respect to any sum received by the assessee from any of its employees to which provision of sub-clause (x) of clause (24) of section 2 apply, and if the same is credited by the assessee to the employees account in the relevant fund or funds on or before the due date, the assessee shall be entitled to the deduction. It is submitted that even explanation to Section 36(1)(va) makes it very much clear that for the purpose of Clause (va) of subsection (1) of section 36 "due date" means the date by which the assessee is required as an employer to credit the employees' contribution to the employees account in the relevant fund under any Act, Rule or Notification issued thereunder or under any standing order, award or contract of service or otherwise. It is submitted that therefore, during the relevant assessment year, if the employer has not deposited the entire amount towards employees' contribution with the PF Department on or before the relevant date (Due Date) under the PF

Act / ESI Act, to the extent there is a shortfall in deposit of the employees' contribution / ESI contribution, the assessee shall not be entitled to the deduction.

4.05. Mr.Manish Bhatt, learned counsel appearing on behalf of the revenue has further submitted that provisions of section 43B of the IT Act which will be applicable to the employers' contribution to any provident fund or any other fund for the welfare of the employees and the Amendment made in section 43B which provides that any such amount of employers' contribution is deposited by the assessee/employer on or before the due date of filing of the return under section 139 of the IT Act shall be entitled to deduction in the relevant year, shall not be applicable with respect to employees' contribution. It is submitted that, therefore, when the assessee has not deposited the employees' contribution in the PF Account before the due date provided under the PF Act and/or ESI Act, the assessee shall not be entitled to deduction under section 36 of the IT Act in the relevant assessment order though the assessee might have deposited employees contribution on or before the due date of filing of the return under section 139 of the IT Act. It is submitted that, therefore, both, the learned CIT(A) as well as the learned tribunal have materially erred in deleting disallowance of shortfall in employees' contribution, by holding that as the assessee had deposited the shortfall on or before the due date of filing of the return under section 139 of the IT Act, the assessee shall be entitled to the deduction under section 36(1)(va) of the Act.

By making above submissions, it is requested by Mr.Manish Bhatt, learned counsel appearing on behalf of the revenue to admit and allow all these appeals and quash and set aside the respective orders passed by the learned appellate tribunal in deleting disallowance of shortfall in employees PF contribution / ESI contribution.

5.00. On the other-hand, Mr.S.N. Soparkar, learned counsel appearing on behalf of the assessee has supported the respective orders passed by the learned appellate tribunal. The learned counsel appearing on behalf of the assessee has vehemently submitted that as such the controversy raised in the present appeals is squarely covered by the decision of the Hon'ble Supreme Court in the case of Alom Extrusions Ltd. (supra)

5.01. Learned counsel appearing on behalf of the assessee has also relied upon the following decisions in support of their submissions that the learned appellate tribunal has rightly deleted disallowance of shortfall in employees' contribution by observing that as the respective assessee have deposited shortfall in employees' contribution in PF Account on or before the due date of filing of the return as provided under section 139 of the IT Act, considering section 43B of the IT Act, the assessee would be entitled to disallowance :-

[1] *Commissioner of Income-Tax vs. Alom Extrusions Ltd.*, [2009] 319 ITR 306 SC;

[2] *Commissioner of Income-Tax vs. Aimil Ltd.*, [2010] 321 ITR 508 (Delhi);

[3] *Commissioner of Income-Tax vs. Nipso Polyfabriks Ltd.*, [2013] 350 ITR 327 (Himachal Preadesh);

[4] *Commissioner of Income-Tax vs. Alembic Glass Industries Ltd.*, [2005] 279 ITR 331 (Gujarat);

[5] *Commissioner of Income-Tax and another vs. Sabari Enterprises*, [2008] 298 ITR 141 (Karnataka);

[6] *Commissioner of Income Tax vs. Pamwi Tissues Ltd.*, reported in [2009] 313 ITR 137 (Bombay).

[7] *Spectrum Consultants India (P) Ltd. vs. Commissioner of Income-Tax, Bangalore-III*, [2013] 34 taxmann.com 20 (Karnataka);

[8] *Commissioner of Income-Tax, Udaipur vs. Udaipur Dugdh Utpadak Sahakari Sandh Ltd.*, [2013] 35 taxmann.com 616 (Rajasthan) and

[9] *Commissioner of Income-Tax, Faridabad vs. Hemla Embroidery Mills (P) Ltd.*, [2013] 37 taxmann.com 160 (Punjab & Haryana).

5.02. Relying upon the aforesaid decisions, it is vehemently submitted by the learned counsel appearing on behalf of the revenue that in all the aforesaid cases it is held that if the shortfall in the provident fund / ESI fund is deposited/made before filing of the return, assessee shall be entitled to deduction under section 36(1) (va) in the same year. It is submitted by the learned counsel appearing on behalf of the assessee that in all the aforesaid decisions it is held by various High Courts that the deletion with effect from April 1, 2004 by the Finance Act, 2003 of the second proviso to section 43B of the Income Tax Act, which stipulated that contributions to the provident fund and Employees State Insurance fund should be made within the time mentioned in section 36(1)(va), that is the time allowed under the Employees' Provident Fund and Miscellaneous Provisions Act, 1952, as well as the Employees' State Insurance Act, 1948, is treated as retrospective in nature. It is further held that if the provident fund and ESI contribution is made before due date of filing of the return under section 139 of the I.T. Act, there shall not be disallowance in view of provisions of section 43B as amended by Finance Act, 2003. It is submitted that in all these cases, admittedly provident fund / ESI funds have been deposited by the respective assessee on or before the due date of filing of the return and therefore, they shall be entitled to the deduction in the same year, as rightly allowed by the learned appellate tribunal.

5.03. Relying upon the decision of the Hon'ble Supreme Court in the case of *Commissioner of Income-Tax, Gujarat-I vs. Sarabhai Sons Ltd.*, reported in [1983] 143 ITR 473 SC, it is submitted by Mr.Soparkar, learned counsel appearing on behalf of the assessee that as observed and held by the Hon'ble Supreme Court in the said decision, if two views are possible and different High Courts have taken a particular one view, this Court may not take a different view. Therefore, it is requested to follow the aforesaid decisions relied upon by the assessee and hold that the respective assessee shall be entitled to the deduction even with respect to the shortfall in depositing employees' contribution and ESI contribution, as the same have been deposited on or before the due date of the filing of the return, considering Amended section 43B of the IT Act and it is requested to dismiss all these appeals.

6.00. In rejoinder to the above, learned counsel appearing on behalf of the revenue has submitted that in most of the decisions which are relied upon by the assessee, the controversy was with respect to shortfall in employers' contribution and/or whether Amendment in section 43B of the IT Act made by Finance Act, 2003 would have retrospective effect or not. It is submitted that even in the case before the Hon'ble Supreme Court in Alom Extrusions Ltd. the controversy was with respect to shortfall in employers' contribution and retrospective application of Amendment in section 43B of the IT Act made by Finance Act, 2003.

6.01. Now, so far as the reliance placed by the learned counsel appearing on behalf of the assessee on the decision of the Hon'ble Supreme Court in the case of Sarabhai Sons Ltd. (supra) and request not to take a contrary view than the view taken by the other High Courts is concerned, it is submitted by Mr.Manish Bhatt, learned counsel appearing on behalf of the revenue that if only one view is possible as canvassed on behalf of the revenue, in such a case it will be open for this Court to take a different view than the view taken by the other High Courts.

By making above submissions it is requested to allow these appeals.

7.00. Heard the learned advocates appearing on behalf of the respective parties at length.

7.01. Short question which is posed for consideration of this Court is with respect to the disallowance of the amount being employees' contribution to PF Account / ESI Contribution which admittedly which the concerned assessee did not deposit with the PF Department / DSI Department within due date under the PF Act and/or ESI Act.

7.02. To answer the above controversy, the relevant provisions of Income Tax Act, 1961 are required to be referred to.

7.03. "Income" has been defined under section 2(24) of the Act.

Under section 2(24)(x), any sum received by the assessee from his employees as contributions to any provident fund or superannuation fund

or any fund set up under the Employees' State Insurance Act, 1948, or any other fund for welfare of such employees, constitute income. Section 2(24)(x) reads as under:–

> **"Section 2(24)(x) :- Any sum received by the assessee from his employees as contributions to any provident fund or superannuation fund or any fund set up under the Employees' State Insurance Act, 1948, or any other fund for welfare of such employees."**

7.04. Section 36 of the Act provides for deduction in computing the income referred to in section 28. The relevant provisions applicable to the present cases would be Section 36(1)(va). As per sub-section 36(1)(va), assessee shall be entitled to the deduction in computing the income referred to in section 28 with respect to any sum received by the assessee from his employees to which the provisions of subclause (x) of clause (24) of section 2 apply, if such sum is credited by the assessee to the employees' accounts in the relevant fund or funds on or before the "Due Date". As per explanation to section 36(1)(va) for the purpose of the said clause, "Due Date" means the date by which the assessee is required as an employer to credit the employees' contribution to the employees account in the relevant fund under the Act, Rule, Order or Notification issued thereunder or under any Standing Order, Award, Contract or Service or otherwise. Section 36(1)(va) reads as under:

> **"Section 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--**
>
> **Section 36(1) (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.**
>
> **Explanation :- for the purpose 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 or service or otherwise."**

7.05. Another provision which is required to be considered while considering the above controversy would be Section 43B of the Act, which stood prior to the amendment of section 43B of the Act vide Finance Act, 2003 and after the amendment to Section 43B of the Act by Finance Act, 2003. Section 43B of the Act prior to the amendment of Section 43B of the Act vide Finance Act, 2003 reads 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 th assessee along with such return:**
>
> **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 subsection (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."**

By the Finance Act, 2003, Second Proviso to section 43B of the Act came to be deleted and even the first proviso to section 43B of the Act came to be amended. The first proviso to section 43B of the Act, after its amendment by the Finance Act, 2003 reads as under:–

> **"Provided that nothing contained in this section 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."**

7.06. Considering the aforesaid provisions of the Act, as per section 2(24)(x), any sum received by the assessee from his employees as contribution to any provident fund or superannuation fund or any fund set up under the provisions of ESI Act or any other fund for the welfare of such employees shall be treated as an 'Income'. Section 36 of the Act deals with the deductions in computing the income referred to in section 28 and as per section 36(1)(va) such sum received by the assessee from any of his employees to which provisions of sub-clause (x) of clause (24) of section 2 apply, the assessee shall be entitled to deduction of such amount in computing the income referred to in section 28 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" i.e. date by which the assessee is required as an employer to credit the employee's contribution to the employee's account in the relevant fund, in the present case, the provident fund and ESI Fund under the Provident Fund Act and ESI Act. Section 43B is with respect to certain deductions only on actual payment. It provides that

notwithstanding anything contained in any other provisions of the Act, a deduction otherwise liable under the Act in respect of..... (B) any sum payable by the assessee as an employer by way of contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of the employees in computing the income referred to in section 28 of that previous year in which such sum is actually paid by him. It appears that prior to the amendment of section 43B of the Act vide Finance Act, 2003, an assessee was entitled to deductions with respect to the sum paid by the assessee as an employer by way of contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of the employees (employer's contribution) provided such sum – employer's contribution is actually paid by the assessee on or before the due date applicable in his case for furnishing 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 and the evidence of such payment is furnished by the assessee along with such return. It also further provided that no deduction shall, in respect of any sum referred to in clause (B) i.e. with respect to the employer's contribution, be allowed unless such sum is actually been paid in cash or by issue of cheque or draft or by any other mode on or before the due date as defined in explanation below clause (va) of sub-section (1) of section 36 and where such sum has been made otherwise that in cash, the sum has been realized within 15 days from the due date. By the Finance Act 2003, Second Proviso of section 43B of the Act has been deleted and First Proviso to section 43B has also been amended which is reproduced hereinabove. Therefore, with respect to employer's contribution as mentioned in clause (b) of section 43(B), if any sum towards employer's contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of the employees is actually paid by the assessee on or before the due date applicable in his case for furnishing the return of the income under sub-section (1) of section 139, assessee would be entitled to deduction under section 43B on actual payment and such deduction would be admissible for the accounting year. However, it is required to be noted that as such there is no corresponding amendment in section 36(1) (va). Deletion of Second Proviso to section 43B vide Finance Act 2003 would be with respect to section 43B and with respect to any sum mentioned in section 43(B) (a to f) and in the present case, employer's contribution as mentioned in section 43B(b). Therefore, deletion of Second Proviso to section 43B and amendment in first proviso to section 43B by Finance Act, 2003 is required to be confined to section 43B alone and deletion of second proviso to section 43B vide amendment pursuant to the Finance Act, 2003 cannot be made applicable with respect to section 36(1)(va) of the Act. Therefore, any sum with respect to the employees' contribution as mentioned in section 36(1)(va), assessee shall be entitled to the deduction of such sum towards the employee's contribution if the same is deposited in the accounts of the concerned

employees and in the concerned fund such as Provident Fund, ESI Contribution Fund, etc. provided the said sum is credited by the assessee to the employees' accounts in the relevant fund or funds on or before the 'due date' under the Provident Fund Act, ESI Act, Rule, Order or Notification issued thereunder or under any Standing Order, Award, Contract or Service or otherwise. It is required to be noted that as such there is no amendment in section 36(1) (va) and even explanation to section 36(1)(va) is not deleted and is still on the statute and is required to be complied with. Merely because with respect to employer's contribution Second Proviso to section 43B which provided that even with respect to employers' contribution [(section 43(B)b], assessee was required to credit amount in the relevant fund under the PF Act or any other fund for the welfare of the employees on or before the due date under the relevant Act, is deleted, it cannot be said that section 36(1)(va) is also amended and/or explanation to section 36(1)(va) has been deleted and/or amended.

It is also required to be noted at this stage that as per the definition of "income" as per section 2(24)(x), any sum received by the assessee from his employees as contribution to any Provident Fund or Superannuation Fund or any fund set up under the provisions of ESI Act or any other fund for the welfare of the such employees is to be treated as income and on fulfilling the condition as mentioned under section 36(1) (va), the assessee shall be entitled to deduction with respect to such employees' contribution. Section 2(24)(x) refers to any sum received by the assessee from his employees as contribution and does not refer to employer's contribution. Under the circumstances and so long as and with respect to any sum received by the assessee from any of his employees to which provisions of sub-clause (x) of sub-section 24 of section 2 applies, assessee shall not be entitled to deduction of such sum in computing the income referred to in section 28 unless and until such sum is credited by the assessee to the employees' account in the relevant fund or funds on or before the due date as mentioned in explanation to section 36(1)(va). Therefore, with respect to the employees contribution received by the assessee if the assessee has not credited the said sum to the employees' account in the relevant fund or funds on or before the due date mentioned in explanation to section 36(1) (va), the assessee shall not be entitled to deductions of such amount in computing the income referred to in section 28 of the Act.

7.07. Now so far as the reliance placed upon the decision of the Hon'ble Supreme Court in the case of Alom Extrusions Ltd. (supra), by the learned ITAT as well as learned advocates appearing on behalf of the assessee in support of their submission that in view of amendment in section 43B pursuant to Finance Act, 2003, by which the second proviso to section 43B has been deleted and therefore even with respect to employees contribution despite section 36(1)(va), and explanation to

section 36(1)(va), if the employees' contribution is credited after the due date mentioned in the particular Act but credited on or before the due date by filing return under section 139 of the Act, assessee shall be entitled to the deduction of such amount, is concerned, on considering the controversy before the Hon'ble Supreme Court in the case of Alom Extrusions Ltd. (supra), the said decision would not be applicable to the facts of the present case. In the said case before Alom Extrusions Ltd., the controversy was whether the amendment in section 43B of the Act, vide Finance Act, 2003 would operate retrospectively w.e.f. 1/4/1988 or not. It is also required to be noted that in the case before the Hon'ble Supreme Court, the controversy was with respect to employers' contribution as per section 43(B)(b) of the Act and not with respect to employees' contribution under section 36(1)(va). Before the Hon'ble Supreme Court in the case of Alom Extrusions Ltd. (supra) the Hon'ble Supreme Court had no occasion to consider deduction under section 36(1)(va) of the Act and with respect to employees' contribution. As stated above, the only controversy before the Hon'ble Supreme Court was with respect to amendment (deletion) of the Second Proviso to section 43(B) of the Income Tax Act, 1961 by the Finance Act, 1963 operates w.e.f. 1/4/2004 or whether it operates retrospectively w.e.f. 1/4/1988. Under the circumstances, the learned tribunal has committed an error in relying upon the decision of the Hon'ble Supreme Court in the case of Alom Extrusions Ltd. (supra) while passing the impugned judgement and order and deleting disallowance of the respective sums being employees' contribution to PF Account / ESI Account, which were made by the AO while considering the proviso to section section 36(1) (va) of the Income Tax Act.

7.08. Now, so far as the reliance placed upon the decision of the Division Bench of this Court in the case of Alembic Glass Industries Ltd. (supra) is concerned, on facts and considering the provisions of section section 36(1)(va) of the Act as is stands, the said decision would not be applicable to the facts of the case on hand and the controversy in question.

7.09. Now, so far as the reliance placed upon the decision of the Karnataka High Court in the case of Sabari Enterprises (supra) is concerned, on facts and controversy raised in the present appeals, the said decision would not be any assistance to the assessee. In the case before the Karnataka High Court, the dispute was with respect to the employer's contribution and the controversy was whether the amendment to section 43B of the Act would be retrospective in nature or not. In the aforesaid case before the Karnataka High court, there was no dispute with respect to employees' contribution as is there in the present case.

7.10. Similarly, the decision of the Bombay High Court in the case of Pamwi Tissues Ltd. (supra) also would not be applicable to the facts of the case on hand. In the case before the Hon'ble Bombay High Court, the

dispute was whether deletion of Second Proviso to section 43B would be applicable retrospectively or not and in that case the dispute was also with respect to employer's contribution.

7.11. Now, so far as the reliance placed upon the decision of the Himachal Pradesh High Court in the case of Nipso Polyfabriks Ltd. (supra); decision of the Karnataka High Court in the case of Spectrum Consultants India (P) Ltd. (supra); decision of the Rajasthan High Court in the case of Udaipur Dugdh Utpadak Sahakari Sandh Ltd. (supra) and decision of the Punjab and Haryana High Court in the case of Hemla Embroidery Mills (P) Ltd. (supra) taking view that where the assessee deposited employees' contribution to ESI and Provident Fund before the due date of filing the return under section 139(1) of the Act, the same would be allowable as deduction, are concerned, With respect and for the reasons stated hereinabove, we are not in agreement with the view taken by the aforementioned High courts. As discussed hereinabove, as there is no amendment in Section section 36(1)(va) of the Income Tax Act and considering section 36(1) (va) of the Income Tax Act as it stands, with respect to any sum received by the assessee from any of his employees to which the provisions of clause (x) of sub-section (24) of section 2 applies, assessee shall not be entitled to deduction of such amount in computing the income referred to in section 28 if such sum is not credited by the assessee to the employees' account in the relevant fund or funds on or before the due date as per explanation to section 36(1)(va) of the Act. Merely because Second Proviso to Section 43B of the Act in which there was a reference to due date as defined in explanation below clause (va) of sub-section (1) of section 36, it cannot be held that even section 36(1)(va) is amended and/or even explanation below clause (va) of sub-section (1) of section 36 is also deleted. It can be said that there was a reference to explanation below clause (va) of sub-section (1) of section 36 in second proviso of section 43B (which has been deleted by Finance Act, 2003), only for the purpose of defining due date as per explanation below clause (va) of sub-section (1) of section 36. Therefore, by deleting Second Proviso to section 43B by Finance Act, 2003, it cannot be said that Section 36(1) (va) is amended and/or explanation below clause (va) of subsection (1) of section 36 is deleted, which is with respect to employees' contribution. Under the circumstances, we are not in agreement with the view expressed by the Himachal Pradesh High Court; Karnataka High Court; Rajasthan High Court and Punjab and Haryana High Court in the cases refereed to hereinabove.

7.12. Now, so far as the reliance placed upon the decision of the Hon'ble Supreme Court in the case of Sarabhai Sons Ltd. (supra), by the learned counsel appearing on behalf of the assessee and his submission that if two views are possible and different High Courts have taken a particular view, this Court may not take a different view, is concerned, we are of the opinion that in the present case, and as discussed

hereinabove, only one view is possible as canvassed on behalf of the revenue and as observed by under section hereinabove and we are not in agreement with the view taken by the Himachal Pradesh High Court; Karnataka High Court; Rajasthan High Court and Punjab and Haryana High Court in the cases refereed to hereinabove, and therefore, the submission made on behalf of the assessee to follow the decisions of the different High Courts refereed to hereinabove and/or not to take a contrary view cannot be accepted.

8.00. In view of the above and for the reasons stated above, and considering section 36(1)(va) of the Income Tax Act, 1961 read with sub-clause (x) of clause 24 of section 2, it is held that with respect to the sum received by the assessee from any of his employees to which provisions of sub-clause (x) of clause (24) of section (2) applies, the assessee shall be entitled to deduction in computing the income referred to in section 28 with respect to such sum credited by the assessee to the employees' account in the relevant fund or funds on or before the "due date" mentioned in explanation to section 36(1)(va). Consequently, it is held that the learned tribunal has erred in deleting respective disallowances being employees' contribution to PF Account / ESI Account made by the AO as, as such, such sums were not credited by the respective assessee to the employees' accounts in the relevant fund or funds (in the present case Provident Fund and/or ESI Fund on or before the due date as per the explanation to section 36(1)(va) of the Act i.e. date by which the concerned assessee was required as an employer to credit employees' contribution to the employees' account in the Provident Fund under the Provident Fund Act and/or in the ESI Fund under the ESI Act.

Consequently, all these appeals are allowed and the impugned judgement and orders passed by the tribunal in deleting the disallowances made by the AO are hereby quashed and set aside and the disallowances of the respective sums with respect to the Provident Fund / ESI Fund made by the AO is hereby restored. The questions raised in present appeal are answered in favour of the revenue. With this, all these appeals are allowed.

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