

## Tax Alert | Delivering clarity

10 August 2020

### Employee provident fund contribution deposited before due date of filing income-tax return is deductible

The Chennai Bench of the Indian Income-tax Appellate Tribunal (ITAT) rendered its decision that employee contribution towards provident fund deposited beyond the due date specified under the relevant statute but deposited (to the credit of employees) with the relevant fund before the due date for filing income-tax return, is deductible.

#### Background:

- Repco Home Finance (P.) Ltd. ('taxpayer')<sup>1</sup> is a housing finance company.
- During the Financial Year (FY) 2012-13, corresponding to Assessment Year (AY) 2013-14, the taxpayer had deposited employee contribution to provident fund (PF) beyond the time stipulated under the Provident Fund Act, but before the due date of filing the income-tax return.
- The Assessing Officer (AO) disallowed the deduction for employee contribution to PF.
- On appeal, the Commissioner of Income-tax Appeals [CIT(A)] relied on certain judicial precedents<sup>2</sup> and allowed the deduction to the taxpayer.
- Aggrieved by the CIT(A)'s order, the AO filed an appeal before the Chennai Bench of Income-tax Appellate Tribunal (ITAT).

#### Decision of the ITAT:

- The ITAT noted the following:
  - Employee contribution received towards employee welfare fund (including PF, superannuation fund, etc.), was taxable as an income of the employer under section 2(24)(x) of the ITA, and as per section 36(1)(va) of the ITA, a deduction of the same was allowable if deposited (to the credit of the employees) in the relevant fund by the due date prescribed under the relevant statute (i.e. statute governing the employee welfare fund).
  - With effect from 1 April 2004, section 43B of the ITA (relating to availability of certain deductions only on payment basis) was amended so that deduction for any sum payable as an 'employer' to employee welfare fund was available, if the same was paid before the due date of filing the

<sup>1</sup> DCIT v. Repco Home Finance P. Ltd. [2020] 117 taxmann.com 233 (Chennai - Trib.)

<sup>2</sup> CIT v. Alom Extrusions Ltd 319 ITR 306(SC), CIT v. Industrial Security and Intelligence India Pvt. Ltd., (Mad) (Appeal Nos.585 and 586 of 2015), ACIT v. M/s.Easun Products of India (P) Ltd. (I.T.A. No. No.182/Mds./2016)

income-tax return for the year in which it was incurred (even if paid beyond the due date under relevant statute).

Until 31 March 2004, the deduction was allowed under section 43B of the ITA only if the payment was made by the due date specified under section 36(1)(va) of the ITA i.e. the due date specified under the respective law.

The Supreme Court (SC) in a past case<sup>3</sup> had held that the above amendment under section 43B of the ITA was curative in nature and applied retrospectively from 1 April 1988.

- The Delhi and Bombay High Court (HC)<sup>4</sup>, had held that the decision of the SC<sup>3</sup> (relating to the amendment under section 43B of the ITA being retrospective in nature) was applicable to both employer and employees contribution. Accordingly, if contributions to PF were deposited by employer with the respective funds before the due date of filing of income-tax return, the deduction was available.

Various other cases<sup>5</sup> (including that of the jurisdictional HC<sup>6</sup>), followed the decisions of the Delhi and Bombay HC<sup>4</sup> and held that deduction towards employees' contribution to PF (deposited after the due date under the governing statute) was available if the same was deposited (to the credit of employee) with respective PF fund before the due date for filing of the income-tax return. The same was on the basis that the relevant statutes permit the employer to make the deposit with some delays, subject to the consequences of interest and penalty in certain cases.

- Contrary judicial precedents<sup>7</sup>, had held that deduction on account of employees' contribution towards PF can only be allowed if the said amount is deposited (to the credit of employee) with relevant funds within the due date prescribed under the relevant statute. The same was on the following basis:
  - The issue before the SC<sup>3</sup> (relating to the amendment under section 43B of the ITA being retrospective in nature) was not with respect to employees' contribution to PF. It was only in context of employers' contribution to PF, wherein the SC held that the amendment to section 43B of the ITA was retrospective.
  - Section 36(1)(va) and section 43B(b) of the ITA operate in different fields i.e. the former takes care of employees' contribution and the latter employers' contribution.

---

<sup>3</sup> CIT v. Alom Extrusions Ltd. [2009] 319 ITR 306 (SC)

<sup>4</sup> CIT v. Aimil Limited [2010] 321 ITR 508 (Delhi HC) and CIT v. Ghatge Patil Transports Limited [2014] 368 ITR 749 (Bom HC)

<sup>5</sup> Geekay Security Services Private Limited v. DCIT [2019] 101 taxmann.com 192 (Bom HC), CIT v. Hindustan Organics Chemicals Limited [2014] 366 ITR 1 (Bom HC), CIT v. Rai Agro Industries Limited [2011] 334 ITR 122 (Punj. & Har. HC); CIT v. Hemla Embroidery Mills Private Limited [2014] 366 ITR 167 (Punj. & Har. HC), CIT v. State Bank of Bikaner and Jaipur [2014] 43 taxmann.com 411 (Raj. HC), CIT v. Jaipur Vidyut Vitran Nigam Limited [2014] 49 taxmann.com 540 (Raj. HC), ACIT v. SPEL Semiconductor Limited (I.T.A. No. 3263/Chny/2018)

<sup>6</sup> CIT v. Industrial Security and Intelligence India Pvt. Ltd. (Mad HC) Tax Case Appeal Nos. 585 and 586 of 2015 and M.P No.1 of 2015

<sup>7</sup> CIT v. Bharat Hotels Limited reported in (2019) 410 ITR 417(Del) CIT v. Merchem Limited reported in (2015) 378 ITR 443(Ker.), Popular Vehicles and Services Private Limited v. CIT (2018) 96 taxmann.com 13(Ker.), CIT v. Gujarat State Road Transport Corporation (2014) 366 ITR 170(Guj.), Checkmate Facility & Electronic Solutions (P.) Ltd. v. Dy. CIT [Tax Appeal No. 1256 of 2018], PCIT v. Suzlon Energy Limited (2020) 115 taxmann.com 340(Guj).

- Employees' contribution was regulated by Section 2(24)(x) and section 36(1)(va) of the ITA and was not affected by section 43B of the ITA.
- Section 43B of the ITA though a non-obstante clause, made deductions allowable only on actual payment; when such deductions were otherwise allowable.
- In view of the above, the ITAT held as follows:
  - High Courts in India had taken different views on allowability of employee contribution to PF and other welfare funds deposited to the credit of employee with relevant fund, beyond the due date under the relevant statute but before the due date of filing the income-tax return.
  - In view of strict and literal interpretation of provisions, the taxpayer was not entitled for deduction if there was a delay in payment of employee contribution beyond the due date prescribed under the relevant statute. Consequently, applicability of section 43B of ITA was relevant.

For entering into the provisions of section 43B of ITA, the deduction ought to be initially allowable. If an employer fails to deposit the employee contribution towards PF and other employee welfare funds before the due date under the relevant statute, then at threshold stage, deduction was not allowable under section 36(1)(va) of the ITA. Consequently, there was no question of entering further into section 43B of the ITA.

- Section 36(1)(va) of the ITA being a deduction provision, was to be construed strictly and the onus was on the taxpayer to prove that it fulfilled all the conditions stipulated therein, before claiming the deduction. In this regard reliance was placed on the decisions of the Supreme Court<sup>3</sup>.

However, the Constitutional Courts viz. HC and SC in India had powers to read down the provisions of the ITA to make it workable and to avoid absurdity.

- The Delhi and Bombay HC<sup>4</sup> after considering, analysing and interpreting the SC case<sup>3</sup> (relating to the amendment under section 43B of the ITA being retrospective in nature) had held that section 43B of the ITA would apply to both employer and employee contributions.

Thus, most of the courts including jurisdictional HC<sup>6</sup>, had allowed the deduction. Otherwise the taxpayer would lose the deduction forever if employee contribution was not deposited within the due date as prescribed under the relevant statute (but deposited before the due date of filing of the income-tax return).

If the employer deposited the employee contribution towards PF and other employee welfare funds beyond the due date prescribed under the relevant statute, then the employer was subjected to interest and in certain cases penalty.

The ITAT held that it was bound by the decision of the jurisdictional HC<sup>6</sup> (following the cardinal principles of judicial discipline) and accordingly, allowed deduction to the taxpayer towards employees' contribution to PF which was deposited beyond the due date prescribed under the relevant statute but before the due date for filing income-tax return.

## Comments:

- Deductibility of employee contribution to PF and other welfare fund deposited before the due date for filing of the income-tax return but beyond the due date prescribed under the relevant statute has been a subject matter of litigation. This ruling affirms the view that deduction for the same should be available.

Taxpayers should also consider impact of the relevant jurisdictional HC before relying on this ruling.



Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited, a UK private company limited by guarantee, and its network of member firms, each of which is Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited, a UK private company limited by guarantee ("DTTL"), its network of member firms, and their related entities. DTTL and each of its member firms are legally separate and independent entities. DTTL (also referred to as "Deloitte Global") does not provide services to clients. Please see [www.deloitte.com/about](http://www.deloitte.com/about) for a more detailed description of DTTL and its member firms.

This material and the information contained herein prepared by Deloitte Touche Tohmatsu India LLP (DTTI LLP) is intended to provide general information on a particular subject or subjects and is not an exhaustive treatment of such subject(s). This material contains information sourced from third party sites (external sites).

DTTI LLP is not responsible for any loss whatsoever caused due to reliance placed on information sourced from such external sites. None of DTTI LLP, Deloitte Touche Tohmatsu Limited, its member firms, or their related entities (collectively, the "Deloitte Network") is, by means of this material, rendering professional advice or services. This information is not intended to be relied upon as the sole basis for any decision which may affect you or your business. Before making any decision or taking any action that might affect your personal finances or business, you should consult a qualified professional adviser.

No entity in the Deloitte Network shall be responsible for any loss whatsoever sustained by any person who relies on this material.

©2020 Deloitte Touche Tohmatsu India LLP. Member of Deloitte Touche Tohmatsu Limited