IN THE INCOME TAX APPELLATE TRIBUNAL, MUMBAI BENCH “C”, MUMBAI

BEFORE SHRI N.V.VASUDEVAN(J.M) &SHRI.RAJENDRA (A.M.)

ITA NO. 7197/Mum/2010(A.Y.2006-07)

M/s. Prakash Cotton Mills Pvt. Ltd., Off Ganpatrao Kadam Marg, Lower Parel (W), Mumbai - 400 013. PAN:AAACP0550H (Appellant)	Vs.	The DCIT, Cir.7(1), 6th Floor, Room No.622, Aaykar Bhavan, Mumbai - 400 020. (Respondent)

Appellant by	:	Shri Hari S. Raheja
Respondent by	:	Shri A.K.Nayak
Date of hearing	:	24/04/2012
Date of pronouncement	:	30/04/2012

ORDER

PER N.V.VASUDEVAN, J.M

This is an appeal by the assessee against the order dated 9/7/2010 of CIT(A)-13, Mumbai relating to the assessment year 2006-07. Ground No.1 & 2 raised by the assessee read as follows:

> “1. On the facts and in the circumstances of the case, the learned Commissioner of Income tax (Appeals) erred in confirming the addition of Rs.9,35,127/- made by the Assessing Officer under section 2(24)(x) read with explanation to section 36(1)(va) of the lnc94 1961 bein9 employees contribution to Provident Fund. The appellant submits that the payments have been made within time and hence no disallowance is called for and therefore the addition ought to be deleted.
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> 2. On the facts and in the circumstances of the case, the learned Commissioner of Income tax (Appeals) erred in confirming the addition of Rs.14,0401- made by the Assessing Officer under section 2(24)(x) read with explanation to section 36(1)(va) of the Income tax Act, 1961 being amount paid to labour welfare fund. The appellant submits that

the payments have been made within time and hence the addition ought to be deleted."

2. The assessee is a company engaged in the business of manufacture and sale of cotton yarn, fabrics and made up. In Annexure -5 to the Tax Audit Report a reference was made to the payment of employees contribution to PF and ESIC as under:

A. Contribution to Provident Fund:

Month	Employees Contribution	Due Date	Date of payment
April 05	1046349	20.05.2005	14.05.2005
May 05	942663	20.06.2005	15.06.2005
June 05	865335	20.07.2005	15.07.2005
July 05	882824	20.08.2005	16.08.2005
Aug.05	950853	20.09.2005	15.09.2005
Sep 05	890062	20.10.2005	15.10.2005
Oct 05	918639	20.11.2005	16.11.2005
Nov 05	909040	20.12.2005	15.12.2005
Dec 05	927811	20.01.2006	16.01.2006
Jan 06	941390	20.02.2006	15.02.2006
Feb 06	872456	20.03.2006	16.03.2006
Mar 06	935127	20.04.2006	16.04.2006

Contribution to Labour Welfare Fund

June 05	14040.00	14.07.2005	19.07.2005

According to the AO the auditors should have qualified in its report that the assessee has made the aforesaid payments were made by the Assessee beyond the due dates as prescribed under the relevant law relating to PF and ESIC contribution. According to the AO the payments have to be made 15 days within the end of the relevant month, but the Auditor has taken 5 days grace period allowed under the relevant law relating to PF and ESIC and has mentioned the due date for payment accordingly. The AO accordingly disallowed a sum of Rs. 9,35,125/- and Rs. 14,040/- being contribution to PF & labour welfare fund respectively. On appeal by the assessee the CIT(A) confirmed the order of the AO. Aggrieved by the order of the AO the assessee has raised ground No.1 & 2 before the Tribunal.

3. We have considered the rival submissions. In Commissioner of Income-tax v. Shri Ganapathy Mills Company Ltd. 243 ITR 879 (Mad) the Hon'ble Madras High Court has held that the payments towards provident fund and employees State insurance made within the grace time allowed under the relevant statutes cannot be disallowed u/s.43-B of the Act. In Commissioner of Income-tax v. Salem Co-operative Spinning Mills Ltd. 284 ITR 621 (Mad), the aforesaid decision has been followed by the Hon'ble Madras High Court. In view of the above, we do not find any justification for the impugned disallowance made by the AO and sustained by the CIT(A). Apart from the above, we find that in **CIT vs. AIMIL Limited** The Hon'ble Delhi High Court in ITA No. 1063 of 2006 ITA No.755 of 2008 ITA No. 204 of 2009 ITA No. 1214/2008 with ITA No. 1246/2008 ITA No. 50/2009 ITA No. 78/2009 judgment dated December 23, 2009 had to deal with a case of disallowance u/s.36(1)(va) of the Act. The Hon'ble Court discussed the provisions of S. 2 (24) (x) which provides that amounts received by an assessee from employees towards PF contributions etc shall be "income" and S. 36 (1) (va) which provides that if such sums are contributed to the employees account in the relevant fund on or before the due date specified in the PF etc legislation, the assessee shall be entitled to a deduction. The Court also noticed that the second Proviso to s. 43B (b) provided that any sum paid by the assessee as an employer by way of contribution to any provident fund etc. shall be allowed as a deduction only if paid on or before the due date specified in 36(1)(va). After the omission of the second Proviso w.e.f 1.4.2004, the deduction is allowable under the first Proviso if the payment is made on or before the due date for furnishing the return of income. In **Alom Extrusions** 319 ITR 306 (SC), the deletion of the second Proviso has been held to be with retrospective effect. The High Court had to consider whether the benefit of s. 43B can be extended to employees'

contribution as well which are paid after the due date under the PF law but before the due date for filing the return. The Hon'ble Court held that:

(i) Though the revenue has argued that a distinction is to be made between "employers' contribution" and "employees' contribution" and that employees' contribution being in the nature of trust money in the hands of the assessee cannot be allowed as a deduction if not paid on or before the due date specified in the PF etc law, the scheme of the Act is that employees' contribution is treated as income u/s 2 (24) (x) on receipt by the assessee and allowed as a deduction u/s 36 (1) (va) on making deposit with the concerned authorities. S. 43B (b) stipulates that such deduction would be permissible only on actual payment;

(ii) The question as to when actual payment should be made is answered by **Vinay Cements** 213 CTR 268 where the deletion of the second Proviso to s. 43B w.e.f 1.4.2004 was held applicable to earlier years as well. As the deletion of the 2nd Proviso is retrospective, the case has to be governed by the first Proviso. **Dharmendra Sharma** 297 ITR 320 (Del) & **P.M. Electronics** 313 ITR 161 (Delhi) followed;

(iii) If the employees' contribution is not deposited by the due date prescribed under the relevant Acts and is deposited late, the employer not only pays interest on delayed payment but can incur penalties also, for which specific provisions are made in the Provident Fund Act as well as the ESI Act. Therefore, the Act permits the employer to make the deposit with some delays, subject to the aforesaid consequences. **Insofar as the Income-tax Act is concerned, the assessee can get the benefit if the actual payment is made before the return is filed, as per the principle laid down in Vinay Cement**.

In view of the above we are of the view that Ground No.1 & 2 raised by the assessee deserves to be allowed. The addition made by the AO is directed to be deleted.

4. Ground No.3 raised by the assessee reads as follows:

> "3. On the facts and in the circumstances of the case, the learned Commissioner of Income tax (Appeals) erred in confirming the addition of Rs.14,51 ,324/- being prior period expenses - "ESIC demand relating to earlier years determined and paid during the year". The appellant submits that the demand of ESIC is determined and paid during the year and the same is allowable under the provisions of the Income tax Act, 1961."

5. There were disputes regarding assessee's obligation to make contribution under ESIC Act 1948. The dispute was with reference to the assessee's obligation to make contribution in respect of certain items of expenditure and relates to the period April 1997 to March 1998 and April 1998 to March 1999. The Dy. Director, ESIC by an order dated 5/4/2005 determined the following amounts as payable by the assesse and the same was also paid by the Assessee as detailed in the chart given below.

Years	Date of order	Date of payment	Amount
1997-98	05.04.2005	14.04.2005	382345.00
1998-99	05.04.2005	16.04.2005	387184.00
1997-98	30.06.2005	13.07.2005	101559.00
1998-99	30.06.2005	13.07.2005	62003.00
2000-01	08.12.2005	25.12.2005	106967.00
2001-02	04.01.2006	18.01.2006	88444.00
1997-98 & 1998 - 99	16.01.2006	25.01.2006	271869.00
2002-03	08.02.2006	15.02.2006	50953.00
Total:			1451324.00

According to the revenue authorities the expenditure related to the earlier assessment years and cannot be claimed as a deduction in the present assessment year because as per mercantile system of accounting only expenditure relating to the previous year can be allowed as deduction. Aggrieved by the order of the CIT(A) the assessee has preferred ground No.3 before the Tribunal.

6. We have heard the rival submissions. Section 43B of the Income Tax Act, 1961 is an exception to the method of accounting followed by an assessee. It lays down that notwithstanding anything contained in any other provisions of the Income Tax Act any payment payable under any law or the time being in force shall be allowed as a deduction only on actual payment irrespective of the period to which it relates and irrespective of the method of accounting followed by the assessee. The disallowance was made in respect of the amount payable by the assessee as an employer under ESIC Act 1948, which was disputed by the assessee. The dispute was finally adjudicated by the concerned authority during the previous year and the assessee has made payment during the previous year. Thus under the provisions of section 43B of the Act as well as under the mercantile system of accounting deduction claimed has to be allowed. The liability to the assessee crystallized during the previous year and, therefore, even under the mercantile system of accounting deduction claimed has to be allowed. For the reasons given above we direct that the deduction claimed by the assessee be allowed.

7. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on the 30th day of April 2012

Sd/-	Sd/-
(RAJENDRA)	(N.V.VASUDEVAN)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Mumbai, Dated 30th April 2012

Copy to: 1. The Appellant 2. The Respondent 3. The CIT City –concerned
4. The CIT(A)- concerned 5. The D.R"C" Bench.

(True copy) By Order

Asst. Registrar, ITAT, Mumbai Benches

MUMBAI.

Vm.