

**आयकर अपीलीय अधिकरण, कटक न्यायपीठ, कटक**

IN THE INCOME TAX APPELLATE TRIBUNAL CUTTACK BENCH, CUTTACK

श्री चन्द्र मोहन गर्ग, न्यायिक सदस्य एवं श्री एल.पी.साहु, लेखा सदस्य के समक्ष ।

**BEFORE SHRI CHANDRA MOHAN GARG, JM & SHRI L.P. SAHU, AM**

**आयकर अपील सं./ITA No.269/CTK/2018**

**(निर्धारण वर्ष / Assessment Year :2014-2015)**

|   |     |                                   |
|---|-----|-----------------------------------|
| Khimji K.D. Sons Pvt. Ltd.,<br>Plot No.621/A, Saheed Nagar,<br>Janpath, Bhubaneswar<br>PIN-751007 | Vs. | DCIT, Circle-1(1),<br>Bhubaneswar |
| स्थायी लेखा सं./PAN No. : <b>AABCK 3660 L</b>   |     |                                   |
| (अपीलार्थी /Appellant)  | ..  | (प्रत्यर्थी / Respondent)         |

|                                  |   |                         |
|----------------------------------|---|-------------------------|
| निर्धारिती की ओर से /Assessee by | : | Shri Bivek Mohanty, AR  |
| राजस्व की ओर से /Revenue by      | : | Shri Subhendu Dutta, DR |

|                                      |   |            |
|--------------------------------------|---|------------|
| सुनवाई की तारीख / Date of Hearing    | : | 08/08/2019 |
| घोषणा की तारीख/Date of Pronouncement | : | 01/10/2019 |

**आदेश / O R D E R**

**Per L.P.Sahu, AM:**

This is an appeal filed by the assessee against the order of CIT(A)-1, Bhubaneswar, dated 10.04.2018 for the assessment year 2014-2015, on the following grounds of appeal :-

- 1. The Appellate Order as well as the assessment order U/s.143(3) of the Income Tax Act is against law, weight of evidences and probabilities of the case.*
- 2. That, the learned assessing officer has arbitrarily disallowed Employees' Share of PF and Employees' State Insurance amounting to Rs.1,08,289.00 and Rs.43,940.00 respectively u/s 36(1 )(va) r.w.s. 2(24)(x) of the Income Tax Act and added the same to the Total Income. Also the honorable 1<sup>st</sup> appellate authority confirmed the same deposite judiciary pronouncement being there in support of the assessee in the matter of Renu Hans Vs. Income Tax officer vide appeal No.0069/2016-17. Hence the order in making the addition is liable to be deleted.*

3. *For these and among other grounds that may emerge at the time of hearing, the order of assessment be quashed to meet the end of justice.*

2. Brief facts of the case are that the assessee is deriving income from retailing in gold, diamond & silver ornaments and branded jewellery items and filed return of income electronically 27.11.2014 declaring total income of Rs.8,80,50,620/-. Later on the case was selected for scrutiny under CASS. Accordingly, statutory notices were issued to the assessee. During the course of assessment proceedings, the assessee was asked to produce the details of EPF and ESIC Fund statement. The assessee had made payment to the employees' contribution fund belatedly and also there was late payment of ESIC. Details of delayed payment of EPF and ESIC as noted in the assessment order by the AO are as under :-

**Late payment of EPF :-**

| Month of contribution by employee | Actual date of payment to employees account | Amount paid Rs. |
|-----------------------------------|---|-----------------|
| August, 2013                      | 23.09.2013                                  | 48393           |
| February, 2014                    | 26.03.2014                                  | 59896           |
|                                   | TOTAL                                       | 1,08,289        |

**Late payment of ESIC :-**

| Month of contribution by employee | Actual date of payment to employees account | Amount paid Rs. |
|-----------------------------------|---|-----------------|
| August, 2013                      | 23.09.2013                                  | 13243           |
| January, 2014                     | 27.03.2014                                  | 15106           |
| February, 2014                    | 27.03.2014                                  | 15591           |
|                                   | TOTAL                                       | 43,940          |

It was noticed by the AO that the assessee has not complied the provisions of Section 36(1)(v) r.w.s.2(24)(x) and Section 43B of the

Act. Accordingly, the added Rs.1,08,289 towards late payment of EPF and Rs.43,940/- towards late payment of ESIC.

3. Feeling aggrieved by the order of AO, the assessee appealed before the CIT(A) and the CIT(A) confirmed the disallowance made by the AO on account of late payment of EPF and ESIC.

4. Further feeling aggrieved, the assessee is now in appeal before the Income Tax Appellate Tribunal.

5. Ld. AR reiterated the submissions made before the lower authorities and submitted that the AO is not justified to make addition on account of late payment of EPF and ESIC, whereas the AO himself has mentioned in the assessment order that it was within the due date. Ld. AR further submitted that the employees contribution amount was deposited within the due date for filing of return of income u/s.139(1) of the Act and also relied on the decision of coordinate bench of the Tribunal in the case of Smt. Renu Hans, ITA No.177/CTK/2017, order dated 19.01.2018 and submitted that the Tribunal following the precedent of the Hon'ble Apex Court in the case of Rajasthan State Beverages Corporation Ltd., [2017] 84 taxmann.com 185 (SC), has decided the issue in favour of the assessee. Therefore, ld. AR submitted that the above decision of Hon'ble Supreme Court is squarely applicable in the present case and prayed for allowing the appeal of the assessee.

6. On the other hand, ld.DR relied on the order of lower authorities and submitted that the assessee did not pay the EPF and ESIC amount within the specified date as prescribed in that Act. Therefore, as per Section 36(1)(va) r.w.s.2(24)(x) of the Act, the AO has rightly treated it as income. Further, ld. DR submitted that Section 43B of the Act stipulates that employee contribution only. If the employee contribution has been paid within the due date for filing of the return of income u/s.139(1) of the Act, the assessee would be entitled for that portion only. But here in the case in hand, the assessee should have deposited the employees contribution within the prescribed date of the relevant Act, which has not been done in this case. Ld. DR further submitted that many courts have decided the issue in favour of the Revenue, therefore, the order of the authorities below should be restored. It was also the contention of ld. DR that the case laws relied on by the ld. AR is not applicable in the peculiar facts and circumstances of the case.

7. After hearing both the sides, perusing the entire materials available on record and the orders of authorities below, we noticed that the assessee has not deposited the employees contribution within the due date as specified in that particular Act. We found substance in the submissions of the ld. DR that Section 36(1)(va) of the Act deals with the deduction in respect of the sum received by the assessee from any

of his employees to which the provisions of sub-section 2(24)(x) of the Act applies, provided such sum is credited by the assessee to the employee's account in relevant fund on or before the due date. The 'due date' is defined under the Explanation to section 36(1)(va) of the Act by stating that the due date referred under the relevant Act and certainly not the due date for filing the return. We also found that this very similar issue has also been decided by this bench of the Tribunal in the case of Milind Gupta, ITA Nos.382&383/CTK/2017, order dated 27.09.2019, wherein the Tribunal has observed as under :-

*“4. We have heard the rival submissions and perused the relevant material on record of the Tribunal. we find that the assessee has deposited the EPF amount of Rs.44,097/- before due date of filing of the return u/s.139(1) of the Act. The addition was made on the ground that the employees' contribution to PF was not deposited within the time prescribed under the P.F.Act. Ld D.R. relied on the Circular No.22/2015 dated 17.12.2015.*

*5. The CBDT issued Circular No. 22/2015 dated 17th December 2015 clarifying that the issue is well settled in so far as employer's contribution if deposited on or before the due date of filing of return of income, is allowable. However, the CBDT was categorical in stating that the settled position does not apply to deduction relating to employee's contribution governed by section 36(1)(va). We find that the following decisions of the various High Courts are in favour of the assessee allowing deduction of employee's contribution paid beyond due date:*

*(i) CIT vs. Hindustan Organic Chemicals Ltd. (2014) 366 ITR 1 (Bom)*

*(ii) CIT vs. Ghatge Patil Transport Limited – 368 ITR 749 (Bom.)*

*(iii) CIT vs. Aimil Ltd. – 321 ITR 508 (Del.)*

*(iv) Spectrum Consultants India (P) Ltd vs CIT – 215 Taxman 597 (Kar.)*

*(v) CIT vs. Raj Agro Industries Ltd. – 334 ITR 122 (P&H) o*

*(vi) CIT vs. Kichha Sugar Co. Ltd. – 356 ITR 351 (Uttarakhand)*

*(vii) CIT vs. Udaipur Dugdh Utpadak Sahakari Sangh Ltd. – 366 ITR 163 (Raj.)*

6. In following decisions, the Hon'ble High Courts strictly interpreted section 36(1) (va) in favour of the revenue and denied deduction :

(i) Popular Vehicles & Services Pvt Ltd vs. CIT – [2018] 96 taxmann.com 13 (Ker.)

(ii) CIT vs. Gujarat State Road Transport Corporation - [2014] 41 taxmann.com 100 (Guj.)

7. Considering the majority view rendered by Hon'ble High Courts on the issue of late deposit of employee's contribution, the decision favourable to the assessee should be followed as per the ratio laid down by Hon'ble Supreme Court in the case of CIT vs. Vegetables Product Ltd., 88 ITR 192 (SC).

8. It may be noted that in the case of PCIT vs. Rajasthan State Beverages Corporation Ltd. reported in 84 Taxman .com. 185, the Supreme Court has dismissed the SLP filed by the Revenue against the judgment of the Hon'ble Rajasthan High Court in Pr. CIT vs Rajasthan State Beverages Corporation Ltd., reported in [2017] 84 taxmann.com 173(Raj.), wherein, where it was held as under :-

“ Section 43B, read with section 36(1)(va), of the **Income-tax Act, 1961** – Business disallowance – Certain deductions to be allowed only on actual payment (PF and ESI contribution) – High Court by impugned order held that amount claimed on payment of PF and ESI having been deposited on or before due date of filing of returns, same could not be disallowed under section 43B or under section 36(1)(va) – Whether SLP against said impugned order was to be dismissed – Held, yes [Para 2] [In favour of assessee]”

9. In the instant case, it is not in dispute that the contribution to EPF was deposited by the assessee before due date of filing the return of income u/s.139(1) of the Act. Although the CBDT Circular No.22/2015 dated 17.12.2015 provides that the deduction relating to employee's contribution to welfare fund are governed by section 36(1)(va) of the Act as relied by the ld D.R. In the case of CIT vs. Bharat Hotels Ltd., (2019) 103 Taxmann.com 295 (Del), the Hon'ble Delhi High Court held thus:

“ 7. The issue here concerns the interplay of Section 2(24)(x) of the Act read with Section 36(1)(va) of the Act alongside provisions of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (especially Regulation 38 of the Employees' Provident Funds Scheme, 1952) and the provisions of the Employees' State Insurance Act, 1948. The AO had brought to tax amounts which were deducted by the employer/assessee from the salaries and wages payable to its employees, as part of their contributions. It is not in dispute that the employer's right to claim deductions under the main part of Section 43-B of the

Act is not an issue. The question the AO had to then decide was whether the amounts deducted from the salaries of the employees which had to be deposited within the stipulated time (in terms of notification/circular dated 19.03.1964 which was modified on 24.10.1973), as far as the EPF contribution went and the period of three weeks as far as the ESI contributions went. The AO made a tabular analysis with respect to the contributions deducted and actually deposited. The cumulative effect of notifications under the Employees' Provident Funds Act, 1952 and the Employees State Insurance Act, 1948 was that in respect of the EPF Scheme contributions the deductions were to be deposited within 15 days of the succeeding wage period with a grace period of 5 days; for ESI contributions the deposit with the concerned statutory authority had to be made within three weeks of the succeeding wage month/period. The CIT in this case confirmed the additions - made by the AO based on the entire amounts that were disallowed. The ITAT however granted complete relief.

8. Having regard to the specific provisions of the Employees' Provident Funds Act and ESI Act as well as the concerned notifications which granted a grace period of 5 days (which appears to have been late withdrawn recently on 08.01.2016), we are of the opinion that the ITAT's decision in this case was not correct. The assessee undoubtedly was entitled to claim the benefit and properly treat such amounts as having been duly deposited, which were in fact deposited within the period prescribed (i.e. 15 + 5 days in the case of EPF and 21 days + any other grace period in terms of the extent notification). As far as the amounts constituting deductions from employees' salaries towards their contributions, which were made beyond such stipulated period, obviously the assessee was not entitled to claim the deduction from its returns.

9. In view of this discussion, the Revenue's appeal is partly allowed. The AO is directed to examine the contributions made with reference to the dates when they were actually made and grant relief to such of them which qualified for such relief in terms of the prevailing provisions and notifications. We also clarify that the assessee would be entitled to deduction in terms of Section 36(1)(va) of the Act."

10. In view of above findings of Hon'ble Delhi High Court in its recent judgment (*supra*), the issue is restored to the file of the Assessing Officer to examine the contributions made with reference to the dates when they were actually made and grant relief to such of claim which qualified for such relief in terms of prevailing provisions of the Act. We clearly observe that the assessee would be entitled to deductions in terms of section 36(1)(va) of the Act. Accordingly, this ground is allowed for statistical purposes.

8. From the above observations of the Tribunal, we found that the Tribunal has restored the issue to the file of AO to examine the contributions made with reference to the dates when they were actually made and grant relief to such of claim which qualified for such relief in terms of prevailing provisions of the Act. Accordingly, the issue in the present appeal, being similar to the issue decided by the Tribunal in the case cited supra, we also restore this issue to the file of AO to decide the same in the terms as observed by the Tribunal cited above. Thus, the ground of appeal of the assessee is allowed for statistical purposes.

9. In the result, the appeal of the assessee is allowed for statistical purposes.

Order pronounced in the open court on 01/10/2019.

**Sd/-**  
**(C.M.GARG)**

न्यायिक सदस्य / JUDICIAL MEMBER

**Sd/-**  
**(L.P.SAHU)**

लेखा सदस्य / ACCOUNTANT MEMBER

**कटक** Cuttack; दिनांक Dated 01/10/2019

प्र.कु.मि/PKM, Sr.P.S.

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant- .  
Khimji K.D. Sons Pvt. Ltd.,  
Plot No.621/A, Saheed Nagar,  
Janpath, BhubaneswarPIN-751007
2. प्रत्यर्थी / The Respondent-  
DCIT, Circle-1(1), Bhubaneswar
3. आयकर आयुक्त(अपील) / The CIT(A),
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कटक / DR, ITAT, Cuttack
6. गार्ड फाईल / Guard file.

आदेशानुसार / BY ORDER,

सत्यापित प्रति //True Copy//

**(Senior Private  
Secretary)**

आयकर अपीलीय अधिकरण, कटक / ITAT, Cuttack