

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'C' : NEW DELHI
(Through Video Conferencing)

BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No.5218/Del/2017
Assessment Year : 2014-15

M/S GDX FACILITY & Vs. DCIT, CIRCLE 10(10), MANAGEMENT SERVICES NEW DELHI P. LTD., ROOM NO. 207, AAYAKAR 29, GDX HOUSE, SANT BHAWAN, NAGAR, EAST OF KAILASH, LAXMI NAGAR, DELHI-2 NEW DELHI - 110015 (PAN :AACCG5199H)
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(Appellant)

(Respondent)

Appellant by : Sh. Naman Desai, CA

Respondent by : Sh. M. Baranwal, Sr. DR.

ORDER

PER H.S. SIDHU, JM :

Assesee has filed the present appeal against the impugned order dated 24.05.2017 passed by the Ld. CIT(A)-35, New Delhi relating to assessment year 2014-15 on the following grounds:-

"1(a) Ld. DCIT as well as Ld. CIT (Appeal) have grossly erred in disallowing employees contribution to ESI and PF Rs. 14,50,188/- deposited beyond due date prescribed under relevant Acts but before due date of filing of return.

(b) Ld. DCIT and Ld. CIT (A) ought to have appreciated the rational of allowance of employer's contribution even if made beyond due date of filing of return under section 43B as per amendment with effect from 01.04.2004.

(c) Ld. DCIT and Ld. CIT(A) ought to have followed the judgement of M/s ALOM Extrusions Limited (SC) as well as Hon'ble High Courts in case of M/s Ghatge Patil Transports Limited, M/s Hemla Embroidery Mills Private Limited, M/s Bihar State Warehousing Corporation Limited and M/s Sagun Foundry Private Limited on the same subject which are binding on the department.

2. Appellant therefore pleads that the decision should be deleted.

Appellant craves leave to add, alter, amend or rescind any of the above grounds of appeal."

2. The facts narrated by the revenue authorities are not disputed by both the parties, therefore no need to repeat the same for the sake of convenience.

3. At the time of hearing, Ld. Counsel for the assessee stated that the issue involved in grounds of appeal has already been adjudicated and decided in favour of the assessee by the Hon'ble Supreme Court of India as well as Hon'ble Jurisdiction High Court and other Hon'ble High Courts, which he has mentioned in his written submissions dated 22nd September 2020. He has also filed his written submissions dated 22nd September 2020 by stating that all facts and case laws supported the claim of assessee and therefore, he requested that after going through the written submissions dated 22nd September 2020 filed by the

assessee, the addition in dispute may be deleted and appeal filed by the assessee may be allowed.

4. Ld. Sr. DR relied upon the order passed by the Ld. First Appellate Authority.

5. We have heard both the parties and perused the orders passed by the revenue authorities especially the written submissions dated 22nd September 2020 filed by the Ld. Counsel for the assessee. We are of the view that the issue regarding levy of tax on disallowance of employees contribution to Provident Fund and ESI in dispute under section 36(1)(va) regarding the payment thereof which has been deposited beyond due date prescribed under the relevant Act, but paid before the filing of the return of income by the assessee and the Hon'ble High Court has allowed this deduction by respectfully following the judgement of the Hon'ble Supreme Court of India and Hon'ble Jurisdictional High Court, which the assessee has mentioned in his written submissions dated 22nd

September 2020. For the sake of convenience, the written submissions filed by the assessee dated 22nd September 2020 are reproduced as under:-

“BEFORE HON’BLE INCOME TAX APPELLATE TRIBUNAL BENCH “C”, DELHI

Appellant: M/s. GDX Facility and Management Services Pvt. Ltd.
Assessment Year: 2014-15 Appeal No.: 5218/DEL/17

Respected Sir’s,
Sub: Written Submissions Ref: Our appeal dated 11/08/2017

Regular hearing through video conferencing has been fixed in the matter of captioned appeal on Thursday, 24th instant before your honour.

Only issue taken up in this Appeal is disallowance of Employee’s Contribution to PF and ESI amounting Rs. 14,50,188/- u/s 36(1)(va) of the Income Tax Act, 1961 on ground of delayed payment over the prescribed date of payment under the relevant Acts. Statement showing details of the relevant delayed payments *vis-a-vis* prescribed date is as per *Annexure — A* for ready reference. Our submissions made hereunder may kindly be considered by your honour while disposing of the appeal.

1.01 From perusal of the attached statement your honour would observe that there is a minor delay in the following payments disallowed u/s 36(1)(va):

Relevant Act	Due Date	Paid Date	Amount	No of Days of Delay
ESIC	21/06/2013	22/06/2013	2,347	1
ESIC	21/07/2013	23/07/2013	3,292	2
ESIC	21/07/2013	23/07/2013	2,466	2
ESIC	21/08/2013	23/08/2013	2,63,011	2
ESIC	21/08/2013	23/08/2013	12,537	2
ESIC	21/08/2013	22/08/2013	2,235	1
ESIC	21/09/2013	24/09/2013	2,77,415	3
ESIC	21/09/2013	24/09/2013	12,036	3
ESIC	21/02/2014	25/02/2014	3,17,706	4
ESIC	21/02/2014	25/02/2014	15,439	4
ESIC	21/02/2014	25/02/2014	2,260	4
PF Act	20/04/2014	21/04/2014	10,265	1
<i>Total</i>			9,21,008	

In the relevant period appellant has tendered the payment by cheque along with the prescribed challans to the authorised bank for accepting such payments within the prescribed period permitted under the relevant Acts. Normally, the payments through cheque take 2-3 days in the clearing and the payment challans are dated based on the date of clearing and not the date on which the payment was tendered. Further where the last prescribed day is a public holiday, limitation period stays extended by a day.

1.02 Thus, apparently this may appear as a delayed payment, these payments have been tendered by the appellant within the prescribed periods under the relevant Acts to the bank receiving such payments. Hon'ble Courts have consistently taken the view that on clearing the cheque, the date of deposit of cheque should be reckoned as a date of making payment for the purpose of compliance under the Acts. Hence, prima facie the above aggregate payments

of Rs. 9,21,008/- are well within the provisions of Section 36(1)(va) of the Act and therefore the same may be allowed

2.01 In respect of balance disallowed amount of Rs. 5,29,180/- appellant draws your kind attention to the definition of term income as per section 2(24)(x) which reads as under:

“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 provisions of the Employees' State Insurance Act, 1948 (34 of 1948), or any other fund for the welfare of such employees.”

Above sub-clause was added as a deemed income to check the tendencies of delinquent assesses of not depositing the amount collected as Employee contribution with the relevant authorities and thereby pocketing employee's fund. Hence, law as per the above provision assumes collection of Employee's contribution to PF and ESI as a deemed income.

2.02 Post collection of such contribution, where the assessee makes a deposit of the amount collected with the appropriate authority and that too within the financial year or before the due date of filing of the income tax return, no such income actually vests with the assessee which can be subjected to tax. In the instant case, all the payments indicated in this para have been deposited with the relevant authorities in the same financial year of the collection of such contribution from employees. Hence, there is no income effectively left with appellant on this count at the end of the previous year which can be taxed under the Act. Hence, the present disallowance needs to be vacated on this count.

3.01 Without prejudice to the above, appellant invites your kind attention to the legislative history of covering both Employer's and Employee's contribution to PF and ESI by including the same u/s 43B and section 36(1)(va). Like section 36(1)(va), sub section (b) of section 43 B covering Employer's contribution to PF and ESI were introduced with effect from 1/4/1988 providing for allowing such payments only when the payments are tendered within due dates prescribed under the relevant Acts.

3.02 Considering probably the reasoning given in para 2 above, legislature permitted the allowance of Employer's contribution to PF and ESI where such payments though not made within the prescribed date under the relevant Acts but made subsequently not only within

the financial year but also before the due date of filing of the IT return beyond the financial year, by dropping second proviso to section 43B with effect from 01/04/2004. Hon'ble Supreme Court in the case of *M/s. Alom Extrusions Ltd. (2009)/185 Taxmann 416 (SC)* have held this amendment to be retrospective right from the date of the introduction of the provision i.e. 01/04/1988. Thus, legislature has already corrected its error in drafting of this provision as pertain to Employer's contribution by the above amendment.

3.03 Employer's and Employee's contribution were placed on the same ground for the purpose of initial taxation by making simultaneous provisions in the Income Tax Act with effect from 01/04/1988. Based on our understanding of the provisions it appears that legislature has missed similar amendment in section 36(1)(va) for not subjecting the disallowance of the amount deposited of such contributions before due date of filing of IT return. Cogent reading of both the provisions supports such identical treatment of both Employee's and Employer's contribution under IT Act. Hence, appellant request your honour to follow the above reasoning for allowing the claim.

4.01 We further refer to a recent Judgment by Chennai ITAT in case of *Dy. CIT v/s Repco Home Finance (P.) Ltd. (117 taxmann.com 233)* where similar issue has been deeply examined and relevant extract of the basis of the decision is reproduced below:

"Thus, keeping in view strict and literal interpretation of provisions of Section 36(1)(va) of the 1961 Act read with Explanation 1 and Section 2(24)(x) of the 1961 Act, the assessee will not be entitled for deduction as the employee contribution towards PF received by assessee was deposited late beyond the time stipulated under the relevant statute governing PF. But, it is equally true that the Constitutional Courts viz. Hon'ble High Courts and Hon'ble Supreme Court in India have powers to read down the provisions of the 1961 Act to make it workable and to avoid absurdity. On perusal of the decision of Hon'ble Supreme Court in the case of *Alom Extrusion (supra)*, it is observed that Hon'ble Supreme Court has elaborately discussed provisions of Section 36(1)(va), 2(24)(x) and amendments made by Finance Act, 2003 to Section 43B of the 1961 Act, which amendments to Section 43B of the 1961 Act were held to be retrospective in nature. The Hon'ble Supreme Court also referred in its decision in *Alom Extrusion (supra)* to its earlier decision in *CIT v. J.H.*

Gotla [1985] 156 ITR 323(SC) , para 10 that intention of the legislature is to be found out from the language used and if strict literal construction leads to an absurd result i.e. result not intended to be sub served by the object of the legislation found in the manner indicated before, then if another construction is possible apart from strict literal construction, then that construction should be preferred to the strict literal construction.

'Though equity' and taxation are often strangers, attempts should be made that these do not remain always so and if a construction results in equity rather than in injustice, then such construction should be preferred to the literal construction.

The Hon'ble Delhi High Court and Hon'ble Bombay High Court after considering, analyzing and interpreting the decision in the case of Alom Extrusion (supra) has held that it will apply both to employers and employee contribution and if the same is deposited before the due date of filing of return of income u/s 139(1) of the 1961 Act, the deduction shall be allowed, even if the same is deposited beyond the time stipulated as due date as prescribed under the provisions of Statute governing PF/ESI Act. Thus, the applicable provision as is contained in Section 36(1)(va) is read down by most of the Constitutional Courts including our Jurisdictional High Court (barring Hon'ble Gujarat High Court and Hon'ble Kerala High Court) to make it workable as otherwise the tax-payer will lose the deduction for ever if the employee contribution is not deposited within due date as prescribed under relevant statute , although the said contribution stood deposited by employer belatedly before the due date for filing of return of income u/s 139(1) of the 1961 Act and the amount will stood brought to tax as income keeping in view provisions of Section 2(24)(x) of the 1961 Act so far employee share of contribution towards Ph ,ESI and other employees welfare funds is concerned. No doubt it is well cherished objective that there should not be an unjust enrichment of the employer of the amount which it collects from

its employees towards employees share of PF , ESI and other employees welfare funds and in the ideal situation , the said amounts ought to have been deposited by employer which it collected from its employees, to the credit of employee with relevant funds within time stipulated as due date by respective statute governing PF/ESI etc. but at the same time if the employer does not deposit the contribution towards PF/ESI etc within due date as prescribed under relevant statute governing PF/ESI etc, the employers are visited with Interest for delayed deposit of PF/ESI as well Penalties for late deposit beyond the time stipulated under the relevant statute governing PF/ESI and other employees welfare funds. Reference is drawn to Section 7Q and 14 of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952. Similarly, Hon'ble Madras High Court in the case of Industrial Security and Intelligence India Private Limited (supra) after considering and interpreting the decision of Hon'ble Supreme Court in the case of Alom Extrusion (supra) and Hon'ble Delhi High Court in the case of Aim il Limited (supra) held that deduction is to be allowed for belated payment of employee contribution to PF/ESI which is deposited beyond the due date stipulated under the relevant statutes governing PF/ESI, but the same stood deposited before the due date for filing of return of income as is prescribed u/s 139(1) of the 1961 Act. ”

4.02 The issue of Employee’s contribution to PF has been debated before several High Courts. Majority of the High Courts including the jurisdictional High Court have taken the view in favour of the assessee as per the following judgements:

Sr. No.	Particulars
1.	CIT vs Aimil Limited[2010] 188 Taxman 265 (Delhi HC)

2.	<i>CIT vs. Ghatge Patil Transports Ltd. (2012) 1002 & 1034368ITR (Bom.)</i>
3.	<i>CIT vs. Hernia Embroidery Mills (P.) Ltd (2014) 366 ITR (Pun & Har) 167/127 [Taxmann 207/37]</i>
4.	<i>Bihar State Warehousing Corporation Ltd. vs. CIT1 (2008) 302(Patna) [71 Taxmann 247]</i>
5.	<i>Sagun Foundry (P.) Ltd. vs. CIT(2006) 87 (All.) [78 Taxmann 47]</i>
6.	<i>CII v. Industrial Security and Intelligence India Pvt. Ltd. (Mad) Tax Case Appeal Nos. 585 and 586 of 2015 and M.P No. 1 of 2015 , dated 24.07.2015</i>
7.	<i>Pr. CIT v. Rajasthan State Beverages Corporation Ltd. [2017] 84 taxmann.com 173</i>

SI P filed by the department against the judgment of Hon'ble Rajasthan High Court in case of M/s *Rajasthan State Beverages Corporation Ltd* referred above has been dismissed by Hon'ble Supreme Court as per the order dated 4th July 2017 (84 taxmann.com 185 (SC)).

Only Hon'ble Gujarat High Court and Hon'ble Kerala High Court have taken a contrary view in the case of M/s. Gujarat State Road Transport Corporation Limited (2014) 223 Taxmann 0398 and Popular Vehicles & Services (P.) Ltd. [2018] 96 taxmann.com 13 (Kerala) which have been disputed before the Hon'ble Supreme Court.

As the majority of the High Courts including Jurisdictional Hon'ble Delhi High Court have taken the view of allowing such deductions where the same are deposited before due date of filing of IT return, appellant requests your honour to follow- these majority judgements as well as binding judgement of Hon'ble Jurisdictional High Court which are much more logical and convincing *vis-a-vis* the opposite view taken by Hon'ble Gujarat High Court and Hon'ble Kerala High Court and allow the appeal of the appellant.



Naman Desai

[A.R.]

Annexure-A

A) Details of delayed payment on account of ESI:

Due Date	Paid Date	Amount
21/06/2013	22/06/2013	2,347
21/06/2013	23/07/2013	2,61,901
21/06/2013	22/07/2013	12,015
21/07/2013	23/07/2013	3,292
21/07/2013	23/07/2013	2,466
21/08/2013	23/08/2013	2,63,011
21/08/2013	23/08/2013	12,537
21/08/2013	22/08/2013	2,235
21/09/2013	24/09/2013	2,77,415
21/09/2013	24/09/2013	12,036
21/02/2014	25/02/2014	3,17,706
21/02/2014	25/02/2014	15,439
21/02/2014	25/02/2014	2,260
<i>Total (A)</i>		<i>11,84,660</i>

B) Details of delayed payment on account of EPF:

Due Date	Paid Date	Amount
20/02/2014	27/05/2014	1,26,420
20/03/2014	27/05/2014	1,28,844
20/04/2014	21/04/2014	10,264
<i>Total (B)</i>		<i>2,65,528</i>
<i>Grand Total (A+B)</i>		<i>14,50,188</i>

5.1 After going through the orders passed by the revenue authorities as well as the written submissions dated 22.09.2020 filed by the Ld. Counsel for the assessee, we are of the considered view that the issue involved in the present appeal has already been adjudicated and decided in favour of the assessee by the Hon'ble Supreme Court of India; Hon'ble High Courts including the Hon'ble Jurisdictional High Court, as mentioned in the written submissions dated 22.09.2020 filed by the assessee, especially the decision of the Hon'ble Supreme Court of India in the case of Alom Extrusion Limited by referring its earlier decision in the case of CIT vs JH Gotla (1985) 156 ITR 323 and Hon'ble Jurisdictional High Court decision in the case of CIT vs. AIMIL Limited (2010) 188 Taxman 265 (Delhi HC) (Supra). Therefore, respectfully following the aforesaid precedents, we delete the addition in dispute by allowing the appeal of the assessee.

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

Above decision was announced on 30TH September, 2020.

Sd/-

(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Sd/-

(H.S. SIDHU)
JUDICIAL MEMBER

SRB.

Copy forwarded to: -

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT

Assistant Registrar