

**IN THE INCOME TAX APPELLATE TRIBUNAL  
HYDERABAD BENCH "SMC", HYDERABAD**

**BEFORE SMT. P. MADHAVI DEVI, JUDICIAL MEMBER**

	ITA No. 38/Hyd/2020		
	Assessment Year: 2018-19		
Shishir Kumar Das, Hyderabad – 500 029. PAN: AITPD 6386 K	Vs.	Deputy Commissioner of Income Tax, Circle-10(1), Hyderabad.	
(Appellant)		(Respondent)	
	Assessee by:	Shri M.V. Anil Kumar	
	Revenue by:	Shri Pavithran Kumar	
	Date of hearing:	19/01/2021	
	Date of pronouncement:	02/02/2021	

**ORDER**

**PER Smt. P. Madhavi Devi, J.M.:**

This is assessee's appeal for the Assessment Year 2018-19 against the order of the Ld. CIT(A)-6, Hyderabad, dated 22/11/2019.

2. Brief facts of the case are that the assessee individual filed his return of income for the relevant assessment year electronically on 29/10/2018 declaring total income of Rs. 13,92,360/-. The return of income was processed U/s. 143(1) of the Act by the Assessing Officer at CPC, Bengaluru determining the total income of the assessee at Rs.

40,14,930/- by making adjustment of Rs. 26,22,570/- U/s. 36(1)(va) of the Act.

3. The assessee preferred an appeal before the Ld. CIT(A) stating that the employee's contribution to Provident Fund and ESI of Rs. 26,22,570/- was remitted before the due date of filing of the return of income U/s. 139(1) of the Act and therefore, the same should not have been disallowed U/s. 36(1)(va) of the Act. The Ld. CIT(A) however, observed that though there are some decisions in favour of the assessee, there were decisions in favour of the Revenue as well. He further observed that the decision of the Hon'ble Supreme Court in the case of CIT vs. Alom Extrusions Ltd reported in (2009) 319 ITR 306 (SC) was in the context of section 43B of the Act and the employer's contribution to Provident Fund and ESI. The Ld. CIT(A) relied upon the decision of the Hon'ble Madras High Court in the case of Unifac Management Services (India) (P.) Ltd vs. DCIT reported in [2018] 409 ITR 225 (Madras) to hold the issue against the assessee and he accordingly brought it to tax. Aggrieved, the assessee is in appeal before the Tribunal by raising the following grounds of appeal:-

- “1. Your appellant submits that the CIT(A) erred in law in confirming the addition made U/s. 36(1)(va) of the Income Tax Act, 1961 ignoring the submissions made by your appellant in response to the proposed adjustment notice.
2. Your appellant submits that the Ld. CIT(A) as well as CPC ought to have considered the reply filed by your appellant and ought not to

*have made the addition of Rs. 26,22,570/- being employees contribution to Provident Fund and ESI u/s. 36(1)(va) of the Income Tax Act, 1961 ignoring the fact that is otherwise allowable U/s. 43B of the Act.*

3. *Your appellant submits that Ld. CIT(A) has provided only one opportunity of hearing and ought to have provided another opportunity of hearing to the appellant.*
4. *Your appellant submits that Ld. CIT(A) as well as the CPC ought to have appreciated the fact that the entire amount of Rs. 26,22,570/- was paid within the financial year or before the due date of filing the return of income. Hence, the same should be allowed as a deduction.*
5. *Your appellant submits that CIT(A) as well as the CPC erred in not treating the expenditure as allowable U/s. 37(1) of the Income Tax Act, 1961, as the payment of Employees and employer's contribution to PF and ESI was incurred in the course of business and for the purposes of business.*
6. *The Ld. CIT(A) ought to have considered the fact that in case of conflicting judgments by the High Courts, the view favourable to the appellant has to be considered.*
7. *For these and such other grounds that may be urged at the time of hearing your appellant prays that the Hon'ble Members may delete the addition of Rs. 26,22,570/-."*

4. Learned Counsel for the assessee Shri M.V. Anil Kumar placed reliance upon the decision of the Hon'ble Supreme Court in the case of CIT vs. Alom Extrusions Ltd (supra) and submitted that various Benches of the Tribunal in a number of cases have held that the said decision is applicable to the employee's contribution to Provident Fund and ESI as well. The Ld. DR, on the other hand, supported the order of the Ld. CIT(A) and the decisions relied upon by him.

5. Having regard to the rival contentions and the material available on record, I find that there is no decision of the Hon'ble Jurisdictional

High Court on this issue and out of decisions of Thirteen High Courts, the decisions of ten High Courts are in favour of the assessee while the decisions of three High Courts are against the assessee. In some of the other High Courts, the issue has been decided both against the assessee as well as in favour of the assessee and therefore, this is a debatable issue at present. The Hon'ble Supreme Court in the case of CIT vs. M/s. Vegetable Products Ltd reported in 88 ITR 192 (SC) has held that if there are two views possible on the same issue, the one which is in favour of the assessee should be adopted. Further, the Hon'ble Bombay High Court in the case of Commissioner of Income Tax vs. Godavari Saraf reported in [1978] 113 ITR 589 (Bom.) has held that if there is no decision of the Jurisdictional High Court then, the decision of the non-jurisdictional High Court is also binding. Therefore, considering the above, I hold that the decision of the Hon'ble Supreme Court in the case of CIT vs. Alom Extrusions Ltd (supra) is applicable to both the employer as well as employee's contribution to Provident Fund and ESI and if the assessee has not remitted the amount collected from the employees before the due date of filing of return of income U/s. 139(1) of the Act, then the same has to be disallowed and brought to tax. With these directions, the appeal of the assessee is allowed and the A.O. is further directed to reconsider the issue, if the contrary view is upheld by the

Apex Court in the appeals before the Hon'ble Supreme Court on this issue.

6. In the result, the assessee's appeal is allowed for statistical purposes.

Pronounced in the open Court on 02<sup>nd</sup> February, 2021.

**Sd/-**  
**(P. MADHAVI DEVI)**  
**JUDICIAL MEMBER**

Hyderabad, Dated: 02<sup>nd</sup> February, 2021

**OKK**

Copy to:-

- 1) Shishir Kumar Das C/o. M. Anandam & Co., Chartered Accountants, Flat No. 7A, Surya Towers, S.P. Road, Secunderabad.
- 2) The Deputy Commissioner of Income Tax, Circle-10(1), Hyderabad.
- 3) The CIT(A)-6, Hyderabad
- 4) The Pr. CIT-6, Hyderabad
- 5) The DR, ITAT, Hyderabad
- 6) Guard File