IN THE INCOME TAX APPELLATE TRIBUNAL,
DELHI BENCH: 'C' NEW DELHI

BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER
AND
SHRI O.P. KANT, ACCOUNTANT MEMBER
[Through Video Conferencing]

ITA No.978/Del./2018
Assessment Year: 2014-15

Shri Manoj Kumar, Prop. Balaji Engineers & Consultants, House No. 9, Sector-9, Gurgaon	**Vs.**	ACIT, Circle-62(1), New Delhi
PAN :AGQPK1786P		
(Appellant)		**(Respondent)**

Appellant by	Shri G.S. Kochar, CA
Respondent by	Shri Bhopal Singh, Sr.DR

Date of hearing	17.02.2021
Date of pronouncement	02.03.2021

ORDER

PER O.P. KANT:

This appeal by the assessee is directed against order dated 30/11/2017 passed by the Learned Commissioner of Income Tax (Appeals)-20, New Delhi [in short 'the Ld. CIT(A)'] for assessment year 2014-15. The Ld. CIT(A) on 10/12/2017 issued a corrigendum to the order dated 30/11/2017, wherein para 4.4 was rectified. The grounds raised by the assessee are reproduced as under:

1. *That the learned CIT(A) erred in partly sustaining the addition of Rs.5,00,000 out of Rs.10,00,000 made by the AO on adhoc and presumptive basis, without finding any specific payment to be non-genuine or not for the purpose of business of the assessee.*
2. *That the learned CIT(A) erred in upholding the order of the AO disallowing a sum of Rs.6,12,210/- being Employees Contribution to PF and ESI, which were deposited before the due date of filing the return of income, by relying on a judgment of the Hon'ble Gujarat High Court, disregarding the judgment of the jurisdictional Delhi High Court in the case of CIT Vs. AIMIL Ltd. & Ors., which had been cited by the Appellant.*

2. Briefly stated facts of the case are that the assessee was engaged in the business of supply of manpower to various companies in the name of proprietary concern, namely, M/s Balaji Engineers and Consultants. For the year under consideration, the assessee filed return of income on 12/10/2014, declaring total income of ₹ 41,01,660/-. The return of income filed by the assessee was selected for scrutiny and statutory notices under Income-tax Act, 1961 (in short 'the Act') were issued and complied with. The scrutiny assessment was completed on 06/12/2016 under section 143(3) of the Act after making certain addition/disallowances. The Ld. CIT(A) allowed part relief. Aggrieved with the addition sustained, the assessee is before the Income Tax Appellate Tribunal (in short 'the Tribunal') raising the grounds as reproduced above.

3. Before us, the parties appeared through Video Conferencing facility and filed paper-book electronically.

4. In ground No. 1, the assessee is aggrieved with addition of ₹ 5 lakh sustained by the Ld. CIT(A) out of the addition of ₹ 10 lakh made by the Assessing Officer out of salary and wages expenses.

4.1 Briefly stated facts qua the issue in dispute are that, in the profit and loss account, the assessee claimed expenses of ₹ 29,17,36,148/- on account of wages and salary, however, on being asked by the Assessing Officer, the assessee could not substantiate the expenses with adequate/supporting bills or vouchers. The Assessing Officer also noticed that most of the expenses were paid in cash, which were not fully vouched. Accordingly, the Assessing Officer made an ad-hoc addition of ₹ 10 lakh to cover unverifiable wages and salary. The Ld. CIT(A) in corrigendum dated 10/12/2017 observed that similar addition were made in assessment year 2011-12 and 2012-13, wherein the Assessing Officer added 1% of the total direct expenses, which were further confirmed by the Ld. CIT(A), however the addition of 1% was restricted to 0.5% by the Learned CIT in assessment year 2012-13. The Ld. CIT(A) in view of the past history, restricted the disallowance to ₹ 5 lakh.

4.2 Before us, the Learned Counsel of the assessee admitted that addition of ₹ 10 lakh was made by the Assessing Officer purely an ad-hoc basis and Ld. CIT(A) has also upheld disallowance of ₹ 5 lakh on ad-hoc basis without pointing out any specific discrepancy or absence of bills or voucher and, therefore in view of the decision of the Hon'ble Delhi High Court in the case of **Friends Clearing Agency Private Limited Vs CIT, 332 ITR 269** and decision of Tribunal in the case of Ganapathi **Enterprises Ltd., 142 ITD 118**, no ad-hoc disallowance could be sustained.

4.3 The Learned DR, on the other hand, relied on the order of the lower authorities.

4.4 We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. We find that the Hon'ble Delhi High Court in the case of **Friends Clearing Agency (P) Ltd.** (supra) has held as under:

> *"10. Having perused the reasoning of the CIT (Appeals) as extracted above and that of ITAT, we are of the view that the said reasoning cannot be sustained. There is no basis for an ad-hoc dis-allowance of Rs.50,000/-. Either it was case that evidence was produced or the evidence was not produced. The basis for deduction of Rs.50,000/- out of a total sum claimed amounting to Rs.1,48,782/- is not clear. Mr.Sabharwal has fairly pointed out the decision in the assessee"s case by the ITAT for the assessment year 1989- 1990 wherein, the ITAT has allowed similar expenses in totality. As a matter of fact, the ITAT has accepted the case of the assessee that for minor amounts relating to conveyance etc. and other business expenses, it is impractical to have vouchers and that internal vouchers of the staff/employees of an organization will suffice. For the said assessment year, the amount claimed towards expenses was under the similar heads, that is, cartage, labour and sealing expenses."*

4.5 Further, the Tribunal the case of **Ganpati Enterprises Ltd.** (supra) has as under:

> *"7. We have heard rival submissions and have gone through the relevant material available on record. As the facts emerge, AO in his order has merely referred to excessiveness of expenditure; self made vouchers and without assigning any reasons ad hoc disallowances have been made, which in A.Y. 2003-04 have been upheld by CIT(A) and in A.Y. 2005-06 & 2006-07 have been partly confirmed. In our view, if the books of assessee are properly maintained and produced before AO, the disallowance shall proceed on items of expenditure, which are not proved by the assessee. Ad hoc disallowance in every year without assigning any reasons is not justifiable. In view thereof, we are inclined to delete the ad hoc disallowance as upheld by CIT(A). Assessee's grounds in this behalf are allowed."*

4.6 We find that the Learned CIT(A) herself has accepted that there is increase in profit during the year as compared to preceding year and also the Assessing Officer has not pointed out

any specific instance of the defect. She also taken note of the decisions cited by the authorized representative of the assessee. In such circumstances, when no specific defect in bills or voucher has been pointed of by the Assessing Officer, no addition on ad-hoc basis can be sustained in view of the decisions above. Accordingly, we delete the addition of ₹ 5 lakh, which was sustained by the Learned CIT(A). The ground No. 1 of the appeal of the assessee is accordingly allowed.

5. In ground No. 2, the assessee has challenged disallowance of ₹ 6,12,210/- for late payment of employees contribution to ESI and PF.

5.1 In the assessment order, the Assessing Officer has listed payments of ₹ 6,12,210/- for Employees' State Insurance (ESI) and Employees' Provident Fund (EPF), which were deposited in respective departments after the due date under respective enactments. The Learned Assessing Officer relying on the Circular No. 22/2015, dated 17/12/2015 issued by the Central Board of Direct Taxes (CBDT) disallowed the payment toward ESI/EPF. The Ld. CIT(A) following the decision of the Hon'ble Gujarat High Court in the case of **CIT Vs Gujarat State Road Transport Corporation, 366 ITR 170** upheld the disallowance. While delivering the above decision, Hon'ble Gujarat High Court has considered the decision of the Hon'ble Supreme Court in the case of **CIT Vs Alom Extrusions Ltd 319 ITR 306.**

5.2 Before us, the Learned Counsel of the assessee submitted that Hon'ble Delhi High Court in the case of **PCIT-7 Vs. Pro Interactive Service (India) P. Ltd. in ITA 983/2018** in decision dated 10/09/2018 has held that payment of employees'

contribution of ESI/PF made before due date of filing of return of income is allowable for deduction, following the earlier decision of the Hon'ble Delhi High Court in the case of CIT Vs AIMIL Ltd. & Ors (supra).

5.3 On the other hand, the Learned DR submitted that Hon'ble Delhi High Court in their detailed decision in the case of **Commissioner of Income-tax Vs. Bharat Hotels Ltd. in ITA 271 of 2005**, dated 06/09/2018 has held that employees' contribution to ESI/EPF should be allowed for deduction, if paid within the due date stipulated in respect of enactments. He submitted that in view of the detailed decision, the finding of the Hon'ble Delhi High Court in the case of Bharat Hotels Ltd. (supra) should be followed.

5.4 We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. There are two types of contribution to ESI/PF while making payment of salary/wages to employees. First contribution is by employer. Deduction of this contribution is governed by the provision of section 43B(b) of the Act on actual payment on or before the due date of the furnishing of return of income. Second contribution to ESI/PF is by the employee. This contribution has been treated as income in the hands of the employer in terms of section 2(24)(x) of the Act which reads as under:

"(24) "income" includes—

(x) 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 ;"

5.5 Deduction for payment of Employees' Contribution to the ESI/PF is governed by section 36(1)(iv) of the Act which reads as under:

"36(1) the deduction provided for in following clauses shall be allowed in respect of the matters dealt with therein in computed the income referred to in section 28-

(i) ….

(ii) ….

(iia) [Omitted by the Fiance Act, 1999, w.e.f. 1-4-200]

(iii) ………

(iv) any sum paid by the assessee as an employer by way of contribution towards a recognised provident fund or an approved superannuation fund, subject to such limits as may be prescribed for the purpose of recognising the provident fund or approving the superannuation fund, as the case may be; and subject to such conditions as the Board may think fit to specify in cases where the contributions are not in the nature of annual contributions of fixed amounts or annual contributions fixed on some definite basis by reference to the income chargeable under the head "Salaries" or to the contributions or to the number of members of the fund;"

5.6 Thus, as per the provisions of the Act, if employees' contribution is paid to the respective department after due date as specified in respective enactment, the employer shall not be allowed deduction under the head 'profit and gains of the business'.

5.7 The Hon'ble Delhi High Court in the case of **Bharat Hotel Ltd.** (supra) has held as under:

"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."

5.8 There is a distinction between employer and employee contribution to ESI/EPF. If contribution of the employee is deducted out of his salary and not paid to the respective department, it is the employer who enjoys the funds of the employee for his benefit in the business and the employee is deprived of interest accrued on said contribution. The employer hold the payment as a trustee till the due date of deposit provided

in respect of enactment. The respective enactment has although provided deterrent to the employer in the form of interest and penalty after late payment, however the employee will be still deprived of the interest if the contribution is paid after the due date of deposit. In view of provision of section 36(1)(iv) Act, the employer is discouraged to make deposit of employees contribution to ESI/EPF after the due date prescribed in respective enactment. Thus, respectfully following the decision of the Hon'ble Delhi High Court in the case of Bharat Hotels Ltd (supra), the finding of the Ld. CIT(A) on the issue in dispute is upheld. The ground No. 2 of the appeal of the assessee is accordingly dismissed.

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

Order pronounced in the open court on 2nd March, 2021

Sd/-
(BHAVNESH SAINI)
JUDICIAL MEMBER

Sd/-
(O.P. KANT)
ACCOUNTANT MEMBER

Dated: 2nd March, 2021.
RK/-(DTDS)
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi