

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "C" MUMBAI**

**BEFORE SHRI MAHAVIR SINGH (VICE PRESIDENT) AND SHRI S. RIFAUR
RAHMAN (ACCOUNTANT MEMBER)**

**ITA No. 4103/MUM/2019
Assessment Year: 2014-15**

The DCIT-14(2)(1),
Room No. 432, 4th floor,
Aayakar Bhavan, M.K. Road,
Marine Lines,
Mumbai-400020.

Appellant

Vs. M/s Positive Packaging
Industries Ltd.,
12-A-06, B-Wing, 13th floor,
Parinee Crescenzo, C-38/39, G-
Block, BKC,
Mumbai-400051.
PAN No. AAACP 2836 Q
Respondent

Revenue by : Ms. Shreekala Pardeshi, DR
Assessee by : Mr. Bhaumik Goda, AR

Date of Hearing : 25/03/2021
Date of pronouncement : 02/06/2021

ORDER

PER S. RIFAUR RAHMAN, A.M.

This is an appeal filed by the Revenue. The relevant assessment year is 2014-15. The appeal is directed against the order of the Commissioner of Income Tax (Appeals)-22, Mumbai [in short 'CIT(A)'] and arises out of the assessment completed u/s 143(3) r.w.s. 92CA(4) of the Income Tax Act 1961, (the 'Act').

2. The brief facts of the case are assessee filed its return of income for assessment year 2014-15 on 27.11.2014 declaring total income at 'NIL' as per normal provision of the Income Tax Act 1961 (in short Act) and Rs.17,03,70,081/- under section 115 JB of the Act. The case was selected for

scrutiny under section 143 (3) of the Act and subsequently statutory notices under section 143 (2) and 142 (1) of the Act were issued and served on the assessee. In response the AR of the assessee attended and filed the relevant information is called for. The Revenue is in appeal with the following grounds :

1. On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the additional depreciation of Rs.3,18,05,283/- u/s 32(1)(iia) of the IT. Act, pertaining to Plants & Machineries acquired and installed in the immediately preceding year but were put to use for less than 180 days in that year.
2. On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition made on account of delay in deposit of employee's ESIC and Labour Welfare Fund Contribution u/s 2(24)(x) r.w.s. 36(1)(va) of the Act.
3. On the facts and circumstances of the case and in law, the Ld. CIT(A) has further erred in relying on the decision of the jurisdictional High Court in the case CIT vs Ghatge Patil Transporters Ltd. [2014] 368 ITR 749 (Bom), wherein the Supreme Court decision in the case of Atom Extension Ltd. [319 ITR 306] has been followed, without having regard to the fact that in that case, Hon'ble Supreme Court has dealt with the employers contribution whereas the present case involves employee's contribution.
4. On the facts and circumstances of the case and in law, the Ld. CIT(A) has further erred in holding that the amended provision of section 43B covers employee's contribution also.

3. In this appeal of the revenue, revenue has raised 2 issues in the grounds of appeal which is, claim of additional depreciation under section 32 (1) (iia) of the Act and issue of delay in deposit of employees ESIC and labour welfare fund contribution. It is brought to our notice that the issue of claim of additional depreciation under section 32 is recurring nature and we noticed that the respective assessing officers in assessment year 2012-13 and 2013-14 had disallowed the claim of additional depreciation and in those respective assessment years the issue was contested before coordinate benches of this tribunal and it was held in favour of the assessee (in ITA No 6360/mum/2017 dated 31.01.2019 and ITA No 7268/mum/2017 dated 22.03.2019). Since this issue is already settled in favour of the assessee, we do not see any reason to

interfere with the findings of Ld. CIT(A). Accordingly ground No. 1 raised by the revenue is dismissed.

4. With regard to grow No. 2,3 and 4, we noticed that assessee has deposited the ESIC and labour welfare fund contribution of the employees beyond the date of due date of the respective Acts. We noticed from the chart of date of payment to the respective funds were listed on page 14 of the Ld. CIT(A) order and notice that there is a delay of only few days from the due date of payment. And the amount involved also is of Rs.18,116/-. We noticed that Ld. CIT(A) deliberated the issue in detail by relying on various case laws of honorable jurisdictional High Court and Delhi High Court and also decisions of various tribunals and came to the conclusion as below:

“In the case of CIT vs. Ghatge Patil Transports Ltd.(2014) 368 ITR 769 also, Hon'ble Bombay High Court held that even employees' contribution to PF etc is allowable if deposited before due date of filing ROI. Thus, though Sec 43B(b) of the Act is related to employer's contribution, the High Courts have held that there is no reason to make distinction between the employees' contribution and the employers' contribution. Once the contribution is made, whether by the employee or by the employer, it is a contribution to a welfare fund held in a trust by the employer, who is bound to deposit the same. When the employer does not deposit the same within the time prescribed under the Welfare Acts, such as the provident fund Act. ESI Act etc., the employer may face criminal prosecution under the said Act. The employer may also be liable to pay interest or penalty. However, that cannot be a reason to deny him the benefit of Sec 43B of the Act, which starts with a non obstante clause and which clearly lays down that the taxpayer can take benefit of deduction of such contributions, if the same are paid before furnishing the return of income. In the case of the assessee, it is observed from Tax audit report submitted by the assessee that, it has received Rs.18,116/- from its employees towards Employee Contribution fund within dates but deposited to the fund houses before filing ITR. In the light of the aforesaid judicial pronouncements, it

is considered that Sec 43B of the Act, 1961 applies to both employee and employer contributions and if the contributions are paid to the fund houses before filing ITR, no disallowance u/s 36(1)(va) is warranted. Thus it is established that when the employee deposits both of its contribution and employees' contribution to the fund houses before the date of filing ITR, the entire amount will be allowed as deduction in the profit and loss account of the assessee u/s 43B of Income-tax Act, 1961. In the light of aforesaid discussion and various judicial pronouncements, the A.O, is thus directed to delete the addition of Rs18,116/- made to the total income of the assessee u/s 36(1)(va) of the Act and allow the said addition u/s 43B of the Act. Therefore, this ground of appeal is allowed.

5. Considering the amount involved and delays involved of only few days and also the conclusion reached by the Ld CIT(A) which are in line with the decisions of this coordinate benches, we do not see any reason to interfere with the findings of the Ld CIT(A). In the result grounds raised by the revenue in this regard are dismissed.

6. In the net result appeal filed by the revenue is dismissed.

Order pronounced in the open Court on 02/06/2021.

Sd/-
(MAHAVIR SINGH)
VICE PRESIDENT

Sd/-
(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Mumbai;

Dated: 02/06/2021.

Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)-

4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,
(Dy./Assistant Registrar)
ITAT, Mumbai