आयकर अपीलीय अधिकरण, विशाखापटणम पीठ, विशाखापटणम

IN THE INCOME TAX APPELLATE TRIBUNAL,
VISAKHAPATNAM BENCH, VISAKHAPATNAM
(through web-based video conferencing platform)

श्री एन के चौधरी,न्यायिक सदस्य एवं श्री डि.एस .सुन्दर सिंह, लेखा सदस्य के समक्ष
BEFORE SHRI N.K.CHOUDHRY, HON'BLE JUDICIAL MEMBER &
SHRI D.S. SUNDER SINGH, HON'BLE ACCOUNTANT MEMBER

आयकर अपील सं**./I.T.A.No.144/Viz/2021**
(निर्धारण वर्ष**/Assessment Year:2019-20)**

Reliant Investigation and Security Services LIG-C-556, Ground Floor Sagar Nagar Visakhapatnam **[PAN : AAKFR4627C]** **(अपीलार्थी/ Appellant)**	Vs. Income Tax Officer Ward-2(5) Visakhapatnam **(प्रत्यर्थी/ Respondent)**

अपीलार्थी की ओर से/ Appellant by	:	Shri G.V.N.Hari, AR
प्रत्यार्थी की ओर से / Respondent by	:	Shri B.Rama Krishna, DR
सुनवाई की तारीख / Date of Hearing	:	15.09.2021
घोषणा की तारीख/Date of Pronouncement	:	23 .09.2021

आदेश /O R D E R

Per Shri D.S.Sunder Singh, Accountant Member :

This appeal is filed by the assessee against the order of the Commissioner of Income Tax (Appeals) [CIT(A)], National Faceless Appeal Centre in order No.ITBA/NFAC/S/250/2021-22/1034381083(1) dated 23.07.2021 for the Assessment Year (A.Y.) 2019-20.

2. In this case, assessee filed the return of income u/s 139(1) of the Income Tax Act, 1961 (in short 'Act') and the Centralized Processing Center

(CPC), Income Tax Department has made adjustments of Rs.14,08,714/- towards disallowance of employees contribution of PF and ESI while processing the return of income u/s 143(1) of the Act, as per the notes appended to the intimation u/s 143(1). The assessee went on appeal before the CIT(A) and submitted that employees contribution to PF and ESI was added to the total income and additions made u/s 143(1) are debatable issues, hence, the same cannot be made addition u/s 143(1). Further, the assessee argued before the CIT(A) that the assessee has paid the employees contribution to PF and ESI after the due date under the respective Acts, but before the due date for filing the return of income and hence requested to delete the addition. The assessee relied on the decision of ITAT, Visakhapatnam in the case of APEPDCL in ITA No.609/Viz/2014 dated 29.07.2016. However, the Ld.CIT(A) held that the employees contribution towards P.F and ESI are covered by the section 36(1)(va) of the Act, which required to be paid before the due date under the specified Acts and non payment of PF, ESI before the due date specified under respective Acts, disentitle the assessee for deduction under I.T.Act. Accordingly, held that there is no case for application of section 43B and relied on the decision in the case of CIT Vs. Gujarat State Road Transport Corporation (2014) 41 taxmann.com 100 and held that there is no mistake

in the intimation passed u/s 143(1), accordingly dismissed the appeal of the assessee. Against which the assessee is in appeal before us.

3. We have heard both the parties and perused the material placed on record. In the instant case, there is no dispute that the return was processed u/s 143(1) and there was no scrutiny assessment made u/s 143(3) of the Act. It is settled issue that no debatable issues are permitted to be made adjustments u/s 143(1) of the Act. In the instant case, what was added in the intimation u/s 143(1) was the employees contribution to PF and ESI. Hon'ble Madras High Court in the case of Redington (India) Ltd. held that employees contribution to PF and ESI is also allowable deduction, if, the same is paid before the due date for filing the return of income. This Tribunal in the case of Andhra Trade Development Corporation in I.T.A. No.434/Viz/2019 dated 05.05.2021 held that debatable issues are not permitted to be made adjustments while processing the return of income u/s 143(1) of the Act. For the sake of clarity and convenience, we extract para No.6 of the order in Andhra Trade Development Corporation which reads as under :

> *" We have heard both the parties, perused the material placed on record. As per the adjustments made by the CPC, Bangalore to the extent of Rs. 7,31,016/- u/sec. 143(1)(a) is an issue which required to be verified with the relevant documents. Therefore, the adjustments are not within the scope provided u/sec. 143(1) (a) of the Act. As per proviso to section 143(1)(a), the AO is required to give an intimation before making such adjustments, either in writing or in*

electronic mode and the department has not demonstrated that it has given an intimation to the assessee proposing to make such adjustments. Therefore, the adjustment made by the CPC u/sec. 143(1)(a) is beyond the scope of the said section, hence, not permissible and accordingly deleted." Even otherwise, the ld. CIT(A) has followed the decision of this Tribunal while allowing the set off of losses and the department did not place any other decision of the superior Court to controvert the decision relied upon by the ld. CIT(A) cited supra. Therefore, the issue is squarely covered by the decision of this Tribunal against the Revenue, hence, we find no reason to interfere with the order of ld. CIT(A) and dismiss the appeal of the Revenue."

4. Since, the facts are identical respectfully following the view taken by this Tribunal, we hold that the addition made by the CPC u/s 143(1) is unsustainable, accordingly deleted. The appeal of the assessee is allowed.

5. On merits also, this Tribunal has consistently viewed that the employees contribution to PF and ESI is allowable deduction if the same is paid before the due date of filing the return of income. In the case of APEPDCL in I.T.A.No.609/V/2014 dated 29.07.2016, the coordinate bench of ITAT, Visakhapatnam after considering the decision of Hon'ble Karnataka High Court in the case of Essae Teraoka (P) Ltd. Vs. DCIT 366 ITR 408 and the decision of coordinate bench of ITAT Hyderabad in the case of Tetra Soft (India) Pvt. Ltd. Vs. ACIT (2015) 40 ITR (Trib) 470 and also taking support from the decision of Hon'ble Supreme Court in the case of CIT Vs. M/s Vegetables Products Ltd., 88 ITR 192, decided the issue in favour of the assessee. For the sake of clarity and convenience, we extract para No.5 to 10 which reads as under:

"5. We have heard both the parties, perused the materials available on record and gone through the orders of the authorities below. The A.O. made additions towards belated payment of employees' contributions to PF. According to the A.O., employees' contribution to provident fund is deductible under the provisions of section 36(1)(va) of the Act, if the same is paid on or before the due date specified under the provident fund Act. The A.O. further was of the opinion that in view of the clear provisions of section 2(24)(x) r.w.s. 36(1)(va) of the Act, any recovery from employees towards provident fund contribution is deemed to be income of the assessee, if the employer not paid the same to the provident fund account of the employee within due date specified under the provisions of PF Act. It is the contention of the assessee that second proviso to section 43B of the Act provides that no deduction shall be allowed unless such sum is actually been paid on or before due date as specified in explanation to 36(1)(va) of the Act which was omitted by the Finance Act, 2003 w.e.f. 1.4.2004 and accordingly, there was no special provision regarding employees' contribution to PF. It is further contended that as per the amended provisions of section 43B of the Act, any sum payable by the assessee as an employer by way of contribution to PF shall be allowed, if the same is paid on or before the due date of filing of return of income u/s 139(1) of the Act.

6. The only issue to be resolved is whether the assessee would be entitled to claim deduction for the employees' contribution made to PF after the due date prescribed under the PF Act, but before the due date prescribed for filing of income tax return in the light of the provisions contained in section 36(1)(va) of the Act and section 43B(b) of the Act. It is the contention of the assessee that there is no distinction between employer and employee contribution after omission of second proviso of section 43B of the Act by Finance Act, 2003 w.e.f. 1.4.2004. We find force in the arguments of the assessee for the reason that there is no difference between employees and employer contribution under the PF Act. Section 6 of Provident Fund Act provides for contribution and the manner in which such contribution shall be made. Paragraph 30 of the PF Scheme provides for payment of contributions. As per the said scheme, the employer at the first instance shall make the total contribution including employees' share. Paragraph 32 provides for recovery of member share of contribution and as per the scheme, the employer can recover the employees' share from the wages paid to the employee. Therefore, as per the PF Act and scheme of contributions, the contributions means and include both employees' and employer's share. Similarly, section 2(c) of the Provident Fund Act defines the contribution to mean a contribution payable in respect of a member under the scheme or the contribution payable in respect of an employee to whom the scheme applies. There is a prescribed mode of payment of contributions under the PF Act. Under the said Act, the employer shall contribute both employees and employer share along with administrative charges before the due date specified under the PF Act. The Act prescribed only one due date for depositing the contribution i.e. 15th of subsequent month with the grace period of 5 days which indicates that there is no difference between employee and employer

contribution. If the legislature intends to differentiate employees and employer contribution, then there would have been two due dates like in the case of Income Tax Act. Therefore, from the above, it is clear that the Provident Fund Act does not differentiate employees and employer contribution and contribution means both employees and employer contribution under the PF scheme.

7. Section 43B of the Act provides for certain deductions to be allowed only on actual payment basis. Sub clause (b) of section 43B of the Act covers any sum payable by the assessee as an employer by way of contribution to any Provident fund or superannuation fund or gratuity fund or any other fund for the welfare of the employees. The proviso to section provides that any sum paid by the assessee on or before the due date of furnishing return of income u/s 139(1) of the Act, then no disallowance can be made under the provisions of section 43B of the Act. A careful consideration of section 43B of the Act, it is clear that an extension is granted to the assessee to make the payment of PF contributions or any other fund till the due date of furnishing return of income u/s 139(1) of the Act. Therefore, in our opinion, there is no difference between employees and employer contribution to PF and if such contribution is made on or before the due date of furnishing return of income u/s 139(1) of the Act, then deduction is to be allowed under the provisions of section 43B of the Act.

8. The Hon'ble Karnataka High Court, in the case of Essae Teraoka (P) Ltd. Vs. DCIT 366 ITR 408 took the view that the word contribution occurring in section 43B of the Act would include employees' contribution to PF in the light of the definition of the word contribution as per the provisions of section 2(c) of the PF Act. As per the said section, contribution would mean both employer's contribution and employees' contribution. Accordingly, it was held that the provisions of section 43B of the Act allowing deduction for payment made before the due date of filing of Income Tax return cannot be ignored. Similarly, the ITAT, Hyderabad Tribunal in the case of Tetra Soft (India) Pvt. Ltd. Vs. ACIT (2015) 40 ITR (Trib) 470 held that when assessee remitted employees' contribution to PF within due date of filing return of income u/s 139(1) of the Act, amount of employees' contribution to PF cannot be disallowed. Similar view was upheld by the Chennai bench of the ITAT, in the case of ACIT Vs. Farida Shoes Pvt. Ltd. (2016) 46 CCH 29. The coordinate bench held that if assessee had not deposited employees' contribution towards provident fund up to the due date as prescribed under relevant statute, but before due date of filing of return no disallowance could be made in view of the provisions of section 43B of the Act. In the case of CIT Vs. Udaipur Dugdh Utpadak Sahakari Sangh Ltd. 35 Taxman 616, the Hon'ble High Court of Rajasthan, after referring to the apex court decision in the case of CIT Vs. Alom Extrusions Ltd. 319 ITR 306 & CIT Vs. Vinay Cement Ltd. held that the deductions should be allowed for the payment of employees' contribution made before the due date of filing of return. Similarly, in the case of CIT Vs. State Bank of Bikaner, the Hon'ble Rajasthan High Court held that contribution paid after the due date under the

respective Act, but before filing the return of income u/s 139(1) of the Act cannot be disallowed u/s 43B of the Act and or u/s 36(1)(va) of the Act.

9. The Ld. D.R. relied upon the decision of Hon'ble High Court of Kerala, in the case of CIT vs. Merchem Ltd, reported in (2015) 378 ITR 443 and submitted that employees' contribution to provident fund is allowed as deduction, if the same is deposited on or before the due date specified under the provisions of provident fund Act. The D.R. also relied upon the decision of Gujarat High Court, reported in (2014) 366 ITR 170, wherein the Hon'ble Gujarat High Court held that since assessee had not deposited said contribution to respective fund account on the date as prescribed in explanation to section 36(1)(va) of the Act, disallowance made by the A.O. was just and proper. Though, the D.R. relied upon certain judicial precedents which are in favour of the revenue, in view of the decision of Hon'ble Supreme Court, in the case of CIT Vs. M/s. Vegetables Products Ltd. reported in 88 ITR 192, wherein the Hon'ble Supreme Court held that if two reasonable constructions of a taxing provision are possible that construction which favours the assessee must be adopted, therefore, by respectfully following the decision of Supreme Court, when divergent views are expressed by different judicial forums, we prefer to follow the views expressed by the Courts which are in favour of the assessee.

10. Considering the facts and circumstances of this case and also following the judicial precedents as discussed above, we are of the view that there is no distinction between employees' and employer contribution to PF, and if the total contribution is deposited on or before the due date of furnishing return of income u/s 139(1) of the Act, then no disallowance can be made towards employees' contribution to provident fund. The CIT(A) after considering the relevant details rightly deleted the additions made by the A.O. We do not see any reasons to interfere with the order of the CIT(A). Hence, we inclined to uphold the CIT(A) order and dismiss the appeal filed by the revenue."

Therefore, respectfully following the view taken by the Tribunal in the above cases, we hold that on merits also, the assessee succeeds in appeal. Accordingly, appeal of the assessee is allowed.

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

Order pronounced in the open court on 23rd September, 2021.

Sd/-	Sd/-
(एन के चौधरी)	**(डि.एस .सुन्दर सिंह)**
(N.K.CHOUDHRY)	**(D.S.SUNDER SINGH)**
न्यायिक सदस्य/ JUDICIAL MEMBER	**लेखा सदस्य/ACCOUNTANT MEMBER**

Dated : 23.09.2021
L.Rama, SPS

आदेश की प्रतिलिपि अग्रेषित/Copy of the order forwarded to:-

1. निर्धारिती/ The Assessee - Reliant Investigation and Security Services, LIG-C-556, Ground Floor, Sagar Nagar, Visakhapatnam
2. राजस्व/The Revenue – Income Tax Officer, Ward-2(5), Visakhapatnam
3. The Pr.Commissioner of Income Tax
4. The Commissioner of Income Tax (Appeals)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, विशाखापटणम/DR, ITAT, Visakhapatnam
6.गार्डफ़ाईल / Guard file

आदेशानुसार / BY ORDER

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Sr. Private Secretary
ITAT, Visakhapatnam