

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH 'SMC', NEW DELHI**

**BEFORE SH. N. K. BILLAIYA, ACCOUNTANT MEMBER  
(THROUGH VIDEO CONFERENCING)**

ITA No.604 & 605/Del/2021  
Assessment Year: 2018-19

<b>99 Hind Suraksha Pvt. Ltd. C/o Lovelesh Gupta(Advocate), H. No.56, Sector-14, Urban Estate, Karnal Haryana132001 PAN No.AAACZ8907A</b>	<b>Vs</b>	<b>DCIT CPC Bangalore</b>
<b>(APPELLANT)</b>		<b>(RESPONDENT)</b>

Appellant by	Sh. Somil Agarwal, Advocate
Respondent by	Sh. Vipul Kashyap, Sr. DR

Date of hearing:	30/09/2021
Date of Pronouncement:	30/09/2021

**ORDER**

**PER N. K. BILLAIYA, AM:**

1. ITA No.604/Del/2021 and 605/Del/2021 are two separate appeals by the assessee preferred against two separate orders of the National Faceless Appeal Centre (NFAC) dated 09.04.2021 pertaining to A.Y.2018-19.

2. ITA No.604/Del/2021 is the appeal against the order framed u/s. 143 (1) of the Act and ITA No.605/Del/2021 is an appeal against the assessment order framed u/s. 154 of the Act.

3. We will first address to the appeal in ITA No.604/Del/2021.

4. Briefly stated the facts of the case are that while processing the return u/s.143 (1) of the Act CPC disallowed Rs.127225/- on account of late deposit of provident fund and Rs.171402/- on account of late deposit of ESI.

5. Assessee assailed the order before the NFAC but the NFAC was of the firm belief that the decision of the Hon'ble Gujarat High Court in the case of Gujarat State Road Transportation 366 ITR 170 fairly apply on the facts of the case and following the same, the appeal of the assessee is dismissed.

6. Before me the strong reliance was placed on the decision of the coordinate bench in the case of Azamgarh Steel & Power Private Limited in ITA No.1626/Del/2020 order dated 31.05.2021. It is the say of the counsel that this Tribunal

while deciding a similar quarrel in favour of the assessee has duly considered the decision of the Hon'ble Gujarat High Court (supra). The counsel further relied upon the decision of this Tribunal in the case of Indian Geotechnical Services in ITA No. 622/Del/2018 order dated 27.08.2021.

7. Per contra the DR strongly supported findings of the lower authorities.

8. I have carefully considered the orders of the authorities below. The details of the deposit of PF/ ESI is as under :-

Nature	Amount	Due Date	Actual Date of deposit
Provident Fund	Rs.1,41,022/-	15-05-2017	29-05-2017
Provident Fund	Rs.1,43,978/-	15-06-2017	22-06-2017
Provident Fund	Rs.1,32,429/-	15-07-2017	24-07-2017
Provident Fund	Rs.1,35,214/-	15-09-2017	16-09-2017
Provident Fund	Rs.1,49,266/-	15-10-2017	21-10-2017
Provident Fund	Rs.1,37,824/-	15-11-2017	25-11-2017
Provident Fund	Rs.1,42,977/-	15-12-2017	30-12-2017
Provident Fund	Rs.1,39,429/-	15-01-2018	16-01-2018
Provident Fund	Rs.1,48,086/-	15-03-2018	17-03-2018
Total	Rs.12,70,225/-		
ESI	Rs.21,735/-	21-05-2017	08-06-2017

ESI	Rs.22,283/-	21-06-2017	24-06-2017
ESI	Rs.20,540/-	15-07-2017	24-07-2017
ESI	Rs.21,781/-	15-10-2017	21-10-2017
ESI	Rs.21,090/-	15-11-2017	17-11-2017
ESI	Rs.20,787/-	15-12-2017	27-12-2017
ESI	Rs.21,501/-	15-01-2018	16-01-2018
ESI	Rs.21,685/-	15-03-2018	17-03-2018
Total	Rs.1,71,402/-		

9. I find that the return was filed on 26.10.2018 and for the year under consideration the extended due date for filing original return was 31.10.2018. This means that the PF and the ESI were not only deposited within the financial year itself but also before filing of the return. I find that this Tribunal in the case of Azamgarh Steel and Power Private Limited (supra) have considered the decision of the Hon'ble Gujarat High Court relied upon by the CIT(A) and held as under :-

6. We have heard the rival submissions and perused the materials available on record. The issue in the present ground is with respect to disallowance of delayed deposit of contribution received by the employees' towards provident funds and ESI fund.

It is an undisputed fact that there has been delay in the actual deposit of payment to the appropriate authority but at the same time it was also a fact that all the contributions received by the assessee from its employees have been deposited before the due date of filing of return of income. We further find that identical issue arose in the case of Dee Development Engineers Ltd. (supra) wherein the Co-ordinate Bench of Tribunal after considering the decision in the case of CIT vs. AIMIL Ltd. (supra) decided the issue of the assessee by observing as under:

*"7. We have heard both the parties and perused all the relevant material available on record. As regards Ground No. 1, the assessee company has not deposited the employees' contribution within the due date which is prescribed under the said statute i.e. Provident Fund and ESIC. This issue is dealt by the Hon'ble Delhi High Court in case of CIT vs. M/s Bharat Hotels Ltd. 410 ITR 417 wherein the issue is decided in favour of the Revenue, without considering the decision of the Hon'ble Delhi High Court in case of CIT vs. AIMIL Ltd. (2010) 321 ITR 508 (Del.). But the Ld. AR relied upon the decision of the Hon'ble Delhi High Court in case of Pr. CIT vs. Pro Interactive Service (India) Pvt. Ltd. ITA No. 983/2018 pronounced on 10.09.2018 wherein the Hon'ble High Court decided the issue in favour of the assessee relying upon the judgment of AIMIL Ltd. (supra). The Hon'ble Delhi High Court held that the legislative intent was/is to ensure that the amount paid is allowed as expenditure only when payment is actually made. We do not think that the legislative intent and objective is to treat belated payment of Employee's Provident Fund (EPF) and Employee's State Insurance Scheme (ESI) as deemed income of the employer under Section 2(24)(x) of the Act. It is settled law that when two judgments are available giving different views then the judgment which is in favour of the assessee shall apply as held in case of Vegetable Products Ltd. 82 ITR 192 by the Hon'ble Supreme Court. Hence, in light of the latest decision in case of Pro Interactive Service (India) Pvt. Ltd., the issue is covered in favour of the assessee. Hence, Ground No. 1 is dismissed."*

10. I further find that this Tribunal in the case of Indian Geotechnical Services (supra) has also considered the amendment brought to the relevant provisions and decided a similar quarrel as under :-

12. Thus, it is clear that there are series of decisions of various High Courts on this issue wherein it was held that the payment of employees contribution if made before due date of filing of return of income u/s.139(1), the same is allowable deduction against the corresponding income of the said amount treated as per the provision of Section 2(24)(x) of the Income Tax Act. We are conscious about the decisions of other High Court taking a different view on this issue. However, the decision of the Hon'ble Jurisdictional High Court is binding on the Tribunal. By the Finance Act, 2021, the provision of Section 36(1)(va) as well as Section 43B have been amended to this extent by inserting the Explanation-2 whereby it is clarified that the provision of Section 43B shall not apply and shall be deemed never to have been applied for the purpose of determining the due date under this clause. For ready reference, we reproduce the Explanation-2 to Section 36(1)(va) as under:

**“Section 36(1)(va)**

**[Explanation 2** – For the removal of doubts, it is hereby clarified that the provisions of section 43B shall not apply and shall be deemed never to have been applied for the purposes of determining the “due date” under this clause;]”

13. This amendment is brought in the statute to provide certainty about the applicability of Section 43B in respect of belated payment of employee’s contribution. We further noted that the memorandum of Finance Bill, 2021 whereby this amendment was proposed and the relevant clause to the said memorandum clearly intended the amendment shall take effect from 1<sup>st</sup> April, 2021 and will accordingly apply to the Assessment Year 2021-22 and subsequent year. Clause 8 and 9 of the said memorandum is relevant which are reproduced hereunder:

**“Rationalisation of various Provisions****Payment by employer of employee contribution to a fund on or before due date**

*Clause (24) of section 2 of the Act provides an inclusive definition of the income. Sub-clause (x) to the said clause provide that income to include any sum received by the assessee from his employees as contribution to any provident fund or superannuation fund or any fund set up under the provisions of ESI Act or any other fund for the welfare of such employees.”*

*Section 36 of the Act pertains to the other deductions. Sub-section (1) of the said section provides for various deductions allowed while computing the income under the head “Profits and gains of business or profession”.*

Clause (va) of the said sub-section provides for deduction of any sum received by the assessee from any of his employees to which the provisions of sub-clause (x) of clause (24) of section 2 apply, if such sum is credited by the assessee to the employee's account in the relevant fund or funds on or before the due date. Explanation to the said clause provides that, for the purposes of this clause, "due date" to mean the date by which the assessee is required as an employer to credit an employee's contribution to the employee's account in the relevant fund under any Act, rule, order or notification issued there-under or under any standing order, award, contract of service or otherwise.

Section 43B specifies the list of deductions that are admissible under the Act only upon their actual payment. Employer's contribution is covered in clause (b) of section 43B. According to it, if any sum towards employer's contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of the employees is actually paid by the assessee on or before the due date for furnishing the return of the income under sub-section (1) of section 139, assessee would be entitled to deduction under section 43B and such deduction would be admissible for the accounting year. This provision does not cover employee contribution referred to in clause (va) of sub-section (1) of section 36 of the Act.

Though section 43B of the Act covers only employer's contribution and does not cover employee contribution, some courts have applied the provision of section 43B on employee contribution as well. There is a distinction between contribution and employee's contribution towards welfare fund. It may be noted that employee's contribution towards welfare funds is a mechanism to ensure the compliance by the employers of the labour welfare laws. Hence, it needs to be stressed that the employer's contribution towards welfare funds such as ESI and PF needs to be clearly distinguished

*from the employee's contribution towards welfare funds. Employee's contribution is employee own money and the employer deposits this contribution on behalf of the employee in fiduciary capacity. By late deposit of employee contribution, the employers get unjustly enriched by keeping the money belonging to the employees. Clause (va) of sub-section (1) of Section 36 of the Act was inserted to the Act vide Finance Act 1987 as a measures of penalizing employers who mis-utilize employee's contributions.*

*Accordingly, in order to provide certainty, it is proposed to –*

- (i) amend clause (va) of sub-section (1) of section 36 of the Act by inserting another explanation to the said clause to clarify that the provision of section 43B does not apply and deemed to never have been applied for the purposes of determining the –due date under this clause; and*
- (ii) amend section 43B of the Act by inserting Explanation 5 to the said section to clarify that the provisions of the said section do not apply and deemed to never have been applied to a sum received by the assessee from any of his employees to which provisions of sub-clause (x) of clause (24) of section 2 applies.*

*These amendments will take effect from 1st April, 2021 and will accordingly apply to the assessment year 2021-22 and subsequent assessment years. [Clauses 8 and 9]"*

14. Therefore, the amended provisions of Section 43B as well as 36(1)(va) are not applicable for the assessment year under consideration. By following the binding decision of Hon'ble Jurisdictional High Court, the employees contribution paid by the assessee before the due date of filing of return of income u/s.139(1) is an allowable deduction. Accordingly, we

decide this issue in favour of the assessee and the disallowance made by the Assessing Officer is deleted.

15. In the result, the appeal of the Assessee is partly allowed.

11. Respectfully following the decision of this Tribunal (surpa), I direct the NFAC to delete the disallowance of Rs.1441627/-.

12. In the result, the appeal filed by the assessee is allowed.

13. Since I have decided the appeal in ITA No.604/Del/2021 in favour of the assessee ITA No.605/Del/2021 becomes otiose.

14. Decision announced in the open court in the presence of both the representatives on 30.09.2021.

Sd/-  
**(N. K. BILLAIYA)**  
**ACCOUNTANT MEMBER**

\*NEHA\*

Date:- 30.09.2021

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR  
ITAT NEW DELHI

Date of dictation	30.09.2021
Date on which the typed draft is placed before the dictating Member	30.09.2021
Date on which the typed draft is placed before the Other member	30.09.2021
Date on which the approved draft comes to the Sr.PS/PS	30.09.2021
Date on which the fair order is placed before the Dictating Member for Pronouncement	30.09.2021
Date on which the fair order comes back to the Sr. PS/ PS	30.09.2021
Date on which the final order is uploaded on the website of ITAT	30.09.2021
Date on which the file goes to the Bench Clerk	30.09.2021
Date on which file goes to the Head Clerk.	
The date on which file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	