IN THE INCOME TAX APPELLATE TRIBUNAL DELHI
BENCH 'B', NEW DELHI

BEFORE SH. ANIL CHATURVEDI, ACCOUNTANT MEMBER
AND SH. SANJAY GARG, JUDICIAL MEMBER

(THROUGH VIDEO CONFERENCING)

ITA No.5570/Del/2017
(Assessment Year : 2013-14)

M/s. Express Roadway P. Ltd., ED-62-B, Madhuban Chowk, Pitampura, New Delhi – 110 088 PAN : AAACE 0255 C	Vs.	ACIT Circle – 8(2) New Delhi
(APPELLANT)		**(RESPONDENT)**

Assessee by	Shri R. N. Poonia, C.A.
Revenue by	Shri Jagdish Singh, Sr. D.R.

Date of hearing:	06.10.2021
Date of Pronouncement:	11.10.2021

ORDER

PER ANIL CHATURVEDI, AM:

This appeal filed by the assessee is directed against the order dated 09.06.2017 of the Commissioner of Income Tax (Appeals)-3, Delhi relating to Assessment Year 2013-14.

2. The relevant facts as culled from the material on records are as under :

3. Assessee is a company stated to be engaged in the business of transportation of goods and also providing warehouse facility. Assessee electronically filed its return of income for A.Y. 2013-14 on 30.09.2013 declaring total income at Rs.1,15,55,190/- and book profit u/s 115JB of the Act at Rs.2,19,88,782/-. The case was selected for scrutiny and thereafter assessment was framed u/s 143(3) of the Act vide order dated 29.02.2016 and the total taxable income was determined at Rs.1,33,64,981/- and book profit u/s 115JB of the Act at Rs.2,19,88,782/-. Aggrieved by the order of AO, assessee carried the matter before the CIT(A) who vide order dated 09.06.2017 in Appeal No.39/16-17 granted partial relief to the assessee. Aggrieved by the order of CIT(A), assessee is now in appeal before us and has raised the following grounds:

1. *"The Ld. CIT(A) has erred on facts and in law in not allowing the deduction on account of employees contribution to PF on the ground that it is not paid within the due date as provided u/s 36(1)(va) of the IT Act, even though most of the payments were made within the extended period of 5 days.*

2. *The Ld. CIT(A) has erred on facts and in law in not allowing the deduction on account of employees contribution to PF on the ground that it is not paid within the due date as provided u/s 36(1)(va) of the IT Act, even though it was paid before due date of the filing of return of income.*

3. *The Ld. CIT(A) has erred on facts and in law in not allowing the deduction on account of employees contribution to PF as per the provision of section 43B of the IT Act, even though the same was paid before due date of furnishing the return of income.*

4. *The appellant craves for liberty to add fresh ground(s) of appeal and also to amend, alter and modify any of the grounds of appeal."*

4. Before us, at the outset, Learned AR submitted that though the assessee has raised various grounds but the sole controversy is with respect to disallowance made u/s 36(1)(va) of the Act.

5. During the course of assessment proceedings, AO noticed that certain payments towards employee's contributions to PF & ESI were deposited after the due date prescribed under the relevant Act (the details of such payments are listed at Page 2 of the assessment order). AO thereafter by relying on the decision of **Kerala High Court in the case of CIT vs. Merchem Ltd. (2015) 378 ITR 443 (Kerala)** held that the aggregate delayed payment of the employee's contribution to ESI/PF amounting to Rs.16,58,877/- cannot be allowed as deduction. He accordingly made its addition u/s 2(24)(x) r.w.s 36(1)(va) of the Act. Aggrieved by the order of AO, assessee carried the matter before the CIT(A) who upheld the order of AO. Aggrieved by the order of CIT(A), assessee is now before us.

6. Before us, Learned AR reiterated the submissions made before the AO and CIT(A) and further submitted that though there has been delay in deposit of contributions of PF & ESIC beyond the due date but all the sums have been deposited before the date of filing of return of income. He therefore submitted that since the amounts have been deposited before the filing of return of income, no disallowance is called for and for this proposition he relied on the decision rendered by Hon'ble Jurisdictional Delhi High Court in the case of **CIT vs. AIMIL Ltd. (2010) 321 ITR**

508 (Del) place reliance on the decision rendered by Hon'ble Delhi High Court and Hon'ble Supreme Court decided the issue in favour of the assessee. He therefore submitted that the addition made by AO be deleted.

7. Learned DR supported the order of lower authorities.

8. We have heard the rival submissions and perused the material available on record. The issue in the present ground is with respect to addition made on account of delayed payment of ESI/EPF. We find that CIT(A) while deciding the issue in favour of the assessee has given a finding that though there was delay in deposit of ESI & EPF contribution but the same were deposited with the appropriate authorities before the due date of filing of return of income. We find that Hon'ble Delhi High Court in the case of **CIT vs. AIMIL Limited (2010) 321 ITR 508 (Del)** held has under:

> *"17. We may only add that if the employees" contribution is not deposited by the due date prescribed under the relevant Acts and is deposited late, the employer not only pays interest on delayed payment but can incur penalties also, for which specific provisions are made in the Provident Fund Act as well as the ESI Act. Therefore, the Act permits the employer to make the deposit with some delays, subject to the aforesaid consequences. Insofar as the Income Tax Act is concerned, the assessee can get the benefit if the actual payment is made before the return is filed, as per the principle laid down by the Supreme Court in Vinay Cement (supra).*
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> *18. We, thus, answer the question in favour of the assessee and against the Revenue. As a consequence, the appeals filed by the assessees stand allowed and those filed by the Revenue are dismissed."*

9. We further find that Hon'ble Delhi High Court in the case of **SPL Industries vs. CIT (2011) 9 Taxmann.com 195 (Delhi)** held as under:

> *"7. It is apt to note that the Division Bench has taken note of the submission advanced by the revenue that the distinction between employers" contribution on the one hand and the employees" contribution on the other. On the foundation that when employees" contribution was recovered from their salaries / wages that is the trust money in the hands of the assessee and, therefore, recourse of law providing for treating the same as income that the assessee received as the employees" contribution would only enable the assessee to claim deduction only on actual payment made by due date specified under the provisions of the Act. The Bench while dealing with the same has opined thus:*
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> *"11. Before we delve into this discussion, we may take note of some more provisions of the Act. Section 2(24) of the Act enumerates different components of income. It, inter alia, stipulates that income includes 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. It is clear from the above that as soon as employees contribution towards provident fund or ESI is received by the assessee by way of deduction or otherwise from the salary / wages of the employees, it will be treated as 'income' at the hands of the assessee. It clearly follows therefrom that if the assessee does not deposit this contribution with provident fund/ESI authorities, it will be taxed as income at the hands of the assessee. However, on making deposit with the concerned authorities, the assessee becomes entitled to deduction under the provisions of Section 36(1)(va) of the Act. Section 43B(b), however, stipulates that such deduction would be permissible only on actual payment. This is the scheme of the Act for making an assessee entitled to get deduction from income insofar as employees" contribution is concerned. It is in this backdrop we have to determine as to at what point of time this payment is to be actually made."*
>
> *8. Upon perusal of the aforesaid, we are of the considered opinion that the decisions rendered in P.M. Electronics Ltd.(supra) and AIMIL Limited (supra) have correctly laid down the law and there is no justification or reason to differ with the same. In the result,*

we do not perceive any merit in this appeal and accordingly the same stands dismissed."

10. Before us, no fallacy in the findings of CIT(A) has been pointed out by the Revenue. Revenue has also not placed on record any contrary binding decision in its support. In view of the aforesaid facts, we find no reason to interfere to the order of CIT(A) and **thus the ground of assessee is allowed.**

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

Order pronounced in the open court on 11.10.2021

Sd/-	**Sd/-**
(SANJAY GARG)	**(ANIL CHATURVEDI)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Date:- 11.10.2021

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Copy forwarded to:

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

ASSISTANT REGISTRAR
ITAT NEW DELHI