IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI "SMC-2" BENCH: NEW DELHI

(THROUGH VIDEO CONFERENCING)

BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER

ITA No.976/Del/2021
[Assessment Year : 2018-19]

Chattar Pal, C/o-LC Yadav & Company, # 205 Arcadia, South City-2, Sector-49, Gurgaon, Haryana-122018 PAN-ASXPP1175E	vs	DCIT, CPC, Bengaluru.
APPELLANT		**RESPONDENT**

Appellant by	Shri L C Yadav, Adv.
Respondent by	Sh. Om Prakash, Sr.DR
Date of Hearing	11.11.2021
Date of Pronouncement	11.11.2021

ORDER

PER KUL BHARAT, JM :

This appeal filed by the assessee for the assessment year 2018-19 is directed against the order of Ld. CIT(A), National Faceless Appeal Centre "NFAC" dated 03.08.2021. The assessee has raised following grounds of appeal:-

1. *"That Ld. CIT(A) erred in confirming the action of Ld. DCIT, CPC in making addition of Rs.24,63,622/- on account of late payment of Provident Fund u/s 36(1)(va) of Income Tax Act, 1961 and raising demand of Rs.5,49,130/- on this account.*
2. *That Ld. CIT(A) erred in confirming the action of Ld. DCIT, CPC in making addition of Rs.24,63,622/- on account of late payment of Provident Fund u/s 36(1)(va) without considering; the latest case laws after the amendment itself, decided the issue in favour of assessee.*

3. That the appellant craves the leave to add, modify, amend or delete any of the grounds of appeal at the time of hearing and all the above grounds are without prejudice to each other."

2. The only effective ground in this appeal is against the sustaining of addition of Rs.24,63,622/- on account of late payment of Provident Fund u/s 36(1)(va) of the Income Tax Act, 1961 ("the Act").

3. Facts giving rise to the present appeal are that the assessee filed its return of income u/s 139(1) of the Act on 24.10.2018 declaring total income of Rs.28,44,090/-. The case of the assessee was processed u/s 142(1) of the Act. While processing the return of income, the claim of the assessee regarding payment of contribution of employees in respect of Provident Fund and ESI was disallowed on account of delay in payment as per respective Acts. However, the payment was made before the date of filing of return of income.

4. Aggrieved against this, the assessee preferred appeal before Ld.CIT(A), confirmed the addition.

5. Now, the assessee is in appeal before this Tribunal.

6. Ld. Counsel for the assessee submitted that the issues raised in this appeal are squarely covered in favour of the assessee. He placed reliance on the decisions of Hon'ble Delhi High Court rendered in the case of *PCIT vs Pro Interactive Service (India) Pvt.Ltd. in ITA No.983/2018 [Del.]* order dated 10.09.2018 and in the case of *CIT vs AIMIL Ltd. 321 ITR 508* and stated that that these binding precedents have been followed by the various Benches of the Tribunal.

7. Per contra, Ld. Sr. DR vehemently opposed these submissions and submitted that law is clear in this respect and he relied upon the decision of Ld.CIT(A). He further relied upon the decision of Hon'ble Delhi High Court in the case of *CIT vs Bharat Hotels Ltd. [2019] 103 Taxmann.com 295 (Delhi)* wherein the Hon'ble High Court has decided the issue in favour of the Revenue by observing as under:-

> *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."*

8. I have heard the rival submissions and perused the material available on record and gone through the orders of the authorities below. Ld.CIT(A) has decided the issue by observing as under:-

> *5. "It is thus clear from the explanatory memorandum that it was always the intention of the legislature that section 43B of the Act was applicable only to the employer's contribution and did not cover employee's contribution. The amendment was necessitated by the fact that some courts have applied the provisions of section 43B on employee contribution as well. The Memorandum explaining the*

provisions in Finance Bill 2021 makes the above intention absolutely clear. Thus the newly introduced amendments are "clarificatory" in nature and therefore are to be applied retrospectively. Even the language used in these sections i.e "shall not apply and shall be deemed never to have been applied' reinforce the clarificatory nature of these amendments and they would thus have retrospective effect.

6. In view of the above amendments to Explanation 5 in Section 43B, and amended clause (va) of section 36(1), the case laws relied upon by the assessee are no longer valid. As per these newly amended provisions, the deduction for the Employee's contribution to the EPF/ESI/PF etc. will only be available if the amount is deposited before the date as specified in Clause 36(va), and NOT the due date for filing of Return u/s 139(1) of the I. T. Act. The addition made by the AO of Rs. 24,63,622/- is therefore upheld and the appellant's appeal is dismissed.

7. For statistical purposes, appeal is DISMISSED."

9. I find merit in the contention of Ld. Counsel for the assessee that the issue is covered by the judgement of Hon'ble Delhi High Court rendered in the case of *AIMIL Ltd.* (supra) wherein it has been held:-

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)."

10. Further, Ld. Counsel for the assessee placed reliance on the judgement of Hon'ble Delhi High Court rendered in the case of *PCIT vs Pro Interactive Service (India) Pvt.Ltd. in ITA No.983/2018 [Del.]* order dated 10.09.2018 held as under:-

> *"In view of the judgement of the Division Bench of Delhi High Court in Commissioner of Income Tax versus AIMIL Limited, (2010) 321 ITR 508 (Del.) the issue is covered against the Revenue and, therefore, no substantial question of law arises for consideration in this appeal.*
>
> *The legislative intent was/is to ensure that the amount paid is allowed as an 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 (EPD) and Employee's State Insurance Scheme (ESI) as deemed income of the employer under section 2(23)(x) of the Act."*

Therefore, respectfully following the ratio laid down by the Hon'ble Jurisdictional High Court in the above-mentioned binding precedents, I hereby direct the Assessing Officer to delete the disallowance. Thus, grounds raised by the assessee are allowed.

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

Above decision was pronounced on conclusion of Virtual Hearing in the presence of both the parties on 11th November, 2021.

Sd/-

(KUL BHARAT)
JUDICIAL MEMBER

Amit Kumar

Copy forwarded to:

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

ASSISTANT REGISTRAR
ITAT, NEW DELHI