आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES,"B" JAIPUR

श्री संदीप गोसाई, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI SANDEEP GOSAIN, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA. No. 167/JP/2021
निर्धारण वर्ष/Assessment Years : 2019-20

Alsisar Hotels & Resorts Pvt. Ltd. Alsisar Haveli, Sansar Chandra Road Jaipur, Jaipur.	बनाम Vs.	DCIT, Circle-1, Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AADCA 4733 C		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/ Assessee by : Shri Niraj Rathore (C.A.)
राजस्व की ओर से/ Revenue by : Smt. Runi Pal (Addl.CIT)

सुनवाई की तारीख/ Date of Hearing : 11/11/2021
उदघोषणा की तारीख/Date of Pronouncement :15/11/2021

आदेश/ ORDER

PER: SANDEEP GOSAIN, J.M.

This is an appeal filed by the assessee against the order of ld. CIT(A), Delhi (NFAC) dated 18.08.2021 challenging the confirmation of additions in respect of employees contribution towards ESI/PF pertaining to 2019-20.

2. Briefly the facts of the case are that the assessee filed its return of income on 13.10.2019 declaring total income of Rs. 1,88,73,352/- which was processed U/s 143(1) and in terms of intimation dated

07.05.2020 issued by CPC, it made disallowance of Rs. 79,644/- towards employee's contribution towards ESI and PF. On appeal, the ld. CIT(A), NFAC has confirmed the disallowance made U/s 143(1) on account of assessee's failure to pay the employee's contribution of PF/ESI within the prescribed due dates as per Section 36(1)(va) of the Act. Against the said order, the assessee is in appeal before us.

3. During the course of hearing, the ld. AR submitted that the assessee-company deposited employee's contribution of PF/ESI though with a delay of few days from the due dates mentioned in the respective Acts, however the same was deposited well before the due date of filing of return of income. It was submitted that the said fact is not under dispute and where such contribution has been deposited before the due date of filing of the return of income, no disallowance U/s 36(1)(va) of the Act can be made and in support, reliance was placed on the Hon'ble Rajasthan High Court decision in case of CIT vs. Rajasthan State Beverages Corporation Ltd. (2017) 392 ITR 2 and CIT vs. State Bank of Bikaner and Jaipur (2014) 43 taxmann.com 411. It was further submitted that the recently Jodhpur Benches of the Tribunal has also taken a similar view in case of Mohangarh Engineers and Construction company vs DCIT, CPC *(in ITA No. 405/JODH/2021 dated 12.08.2021)* and similar view has been taken by the Bangalore Benches in case of Shri Gopalkrishna Aswini Kumar vs. ACIT *(in ITA No. 359/Bang/2021 dated 12.10.2021*). It was further submitted that the explanation added to Section 36(1)(va) of the Act by the Finance Act, 2021 will take effect from 1st April, 2021 and will apply from the assessment year 2021-22 and subsequent assessment years and not to

the impugned assessment year. It was further submitted that the adjustment is beyond the scope of Section 143(1) of the Act. It was accordingly submitted that the adjustment so made by the CPC and confirmed by the ld. CIT(A) NFAC may be directed to be deleted.

4. Per contra, the ld. DR submitted that as per details furnished in the tax audit report, the payment of employee's contribution of PF/ESI amounting to Rs. 79,644/- was not made within the prescribed due date U/s 36(1)(va) of the Act and since these amount were not disallowed in the return of income filed by the assessee, the variance between the tax audit report and ITR has been duly flagged by the CPC in the computerized processing and disallowance U/s 143(1)(a)(iv) on the basis of fact furnished by the assessee was made which clearly fails within ambit of prima facie adjustment to be carried out U/s 143(1)(a)(iv) of the Act. Further, reliance was placed on the amendment brought in by the Finance Act, 2021 wherein the explanation to Section 36(1)(va) has been introduced. It was submitted from the said amendment, it is evident that the law is and has always very clear i.e. employee's contribution to specified fund will not be allowed as deduction U/s 36(1)(va) if there is delay in deposit even by a single day as per the due dates mentioned in the respective legislation. It is also clear that the amendments are only declaratory/clarificatory in nature and are therefore, applicable with retrospective effect by necessary intendment of deeming nature expressly stated therein. The ld. DR accordingly submitted that in view of the unambiguous wording of the now amended provisions of Section 36(1) and 43B, it is clear that the employee's contribution can be

allowed as a deduction only if it had been paid within the prescribed due dates under the relevant welfare funds and this position of law is and has always been the case and the clarification brought about by the amendment clearly apply retrospectively. It was therefore rightly held by the ld CIT(A) that the disallowance made U/s 143(1) of the Act by CPC on account of assessee's failure to pay the employees' contribution of PF/ESI within the prescribed due dates as per Section 36(1)(va) is strictly in accordance with law and clearly comes under the prima facie adjustments as envisaged U/s 143(1)(a)(iv) of the Act.

5. We have heard the rival contentions and purused the material available on record. In case of **Mohangarh Engineers and Construction Company vs DCIT, CPC** (Supra), speaking through one of us, we have extensively dealt with the identical matter relating to employee's contribution towards ESI/PF and our findings therein read as under: -

> *"13. We have heard the rival contentions and perused the material available on record. On perusal of the details submitted by the assessee as part of its return of income, it is noted that the assessee has deposited the employees's contribution towards ESI and PF well before the due date of filing of return of income u/s 139(1) and the last of such deposits were made on 16.04.2019 whereas due date of filing the return for the impugned assessment year 2019-20 was 31.10.2019 and the return of income was also filed on the said date. Admittedly and undisputedly, the employees's contribution to ESI and PF which*

have been collected by the assessee from its employees have thus been deposited well before the due date of filing of return of income u/s 139(1) of the Act.

14. The issue is no more res integra in light of series of decisions rendered by the Hon'ble Rajasthan High Court starting from CIT vs. State Bank of Bikaner & Jaipur (supra) and subsequent decisions.

15. In this regard, we may refer to the initial decision of Hon'ble Rajasthan High Court in case of CIT vs. State Bank of Bikaner & Jaipur wherein the Hon'ble High Court after extensively examining the matter and considering the various decisions of the Hon'ble Supreme Court and various other High Courts has decided the matter in favour of the assessee. In the said decision, the Hon'ble High Court was pleased to held as under:

> *"20. On perusal of Sec.36(1)(va) and Sec.43(B)(b) and analyzing the judgments rendered, in our view as well, it is clear that the legislature brought in the statute Section 43(B)(b) to curb the activities of such tax payers who did not discharge their statutory liability of payment of dues, as aforesaid; and rightly so as on the one hand claim was being made under Section 36 for allowing the deduction of GPF, CPF, ESI etc. as per the system followed by the assessees in claiming the deduction i.e. accrual basis and the same was being allowed, as the liability did exist but the said amount though claimed as a deduction was not being deposited even after lapse of several years.*

Therefore, to put a check on the said claims/deductions having been made, the said provision was brought in to curb the said activities and which was approved by the Hon'ble Apex Court in the case of Allied Motors (P) Ltd. (supra).

21. A conjoint reading of the proviso to Section 43-B which was inserted by the Finance Act, 1987 made effective from 01/04/1988, the words numbered as clause (a), (c), (d), (e) and (f), are omitted from the above proviso and, further more second proviso was removed by Finance Act, 2003 therefore, the deduction towards the employer's contribution, if paid, prior to due date of filing of return can be claimed by the assessee. In our view, the explanation appended to Section 36(1)(va) of the Act further envisage that the amount actually paid by the assessee on or before the due date admissible at the time of submitting return of the income under Section 139 of the Act in respect of the previous year can be claimed by the assessee for deduction out of their gross total income. It is also clear that Sec.43B starts with a notwithstanding clause & would thus override Sec.36(1) (va) and if read in isolation Sec. 43B would become obsolete. Accordingly, contention of counsel for the revenue is not tenable for the reason aforesaid that deductions out of the gross income for payment of tax at the time of submission of return under Section 139 is permissible only if the statutory liability of payment of PF or other contribution referred to in Clause (b) are paid within

the due date under the respective enactments by the assessees and not under the due date of filing of return.

22. We have already observed that till this provision was brought in as the due amounts on one pretext or the other were not being deposited by the assessees though substantial benefits had been obtained by them in the shape of the amount having been claimed as a deduction but the said amounts were not deposited. It is pertinent to note that the respective Act such as PF etc. also provides that the amounts can be paid later on subject to payment of interest and other consequences and to get benefit under the Income Tax Act, an assessee ought to have actually deposited the entire amount as also to adduce evidence regarding such deposit on or before the return of income under sub-section (1) of Section 139 of the IT Act.

23. Thus, we are of the view that where the PF and/or EPF, CPF, GPF etc., if paid after the due date under respective Act but before filing of the return of income under Section 139(1), cannot be disallowed under Section 43B or under Section 36(1)(va) of the IT Act."

16. The said decision has subsequently been followed in CIT vs. Jaipur Vidyut Vitran Nigam Ltd. (supra), CIT vs. Udaipur Dugdh Utpadak Sahakari Sangh Ltd. (supra), and CIT vs Rajasthan State Beverages Corportation Limited (supra). In all these decisions, it has been consistently held that where the PF and ESI dues are paid after the due date under the respective

statues but before filing of the return of income under section 139(1), the same cannot be disallowed under section 43B read with section 36(1)(va) of the Act.

17. We further note that though the ld. CIT(A) has not disputed the various decisions of Hon'ble Rajasthan High Court but has decided to follow the decisions rendered by the Hon'ble Delhi, Madras, Gujarat and Kerala High Courts. Given the divergent views taken by the various High Courts and in the instant case, the fact that the jurisdiction over the Assessing officer lies with the Hon'ble Rajasthan High Court, in our considered view, the ld CIT(A) ought to have considered and followed the decision of the jurisdictional Rajasthan High Court, as evident from series of decisions referred supra, as the same is binding on all the appellate authorities as well as the Assessing officer under its jurisdiction in the State of Rajasthan.

18. In light of aforesaid discussion and in the entirety of facts and circumstances of the case, the addition by way of adjustment while processing the return of income u/s 143(1) amounting to Rs 4,38,530/- so made by the CPC towards the delayed deposit of the employees's contribution towards ESI and PF though paid well before the due date of filing of return of income u/s 139(1) of the Act is hereby directed to be deleted as the same cannot be disallowed under section 43B read with section 36(1)(va) of the Act in view of the binding decisions of the Hon'ble Rajasthan High Court."

6. In the instant case, admittedly and undisputedly, the employees' contribution to ESI and PF collected by the assessee from its employees have been deposited well before the due date of filing of return of income u/s 139(1) of the Act. Further, the ld D/R has referred to the explanation to section 36(1)(va) and section 43B by the Finance Act, 2021 and has also referred to the rationale of the amendment as explained by the Memorandum in the Finance Bill, 2021, however, we find that there are express wordings in the said memorandum which says *"these amendments will take effect from 1st April, 2021 and will accordingly apply to assessment year 2021-22 and subsequent assessment years".* In the instant case, the impugned assessment year is assessment year 2019-20 and therefore, the said amended provisions cannot be applied in the instant case. Similar view has been taken by the Coordinate Bangalore Benches in case of **Shri Gopalkrishna Aswini Kumar vs. ACIT** (supra) wherein it has held as under:-

> *"7. The Hon'ble Karnataka High Court in the case of Essae Teraoka Pvt. Ltd., (supra) has taken the view that employee's contribution under section 36(1)(va) of the Act would also be covered under section 43B of the Act and therefore if the share of the employee's share of contribution is made on or before due date for furnishing the return of income under section 139(1) of the Act, then the assessee would be entitled to claim deduction. Therefore, the issue is covered by the decision of the Hon'ble Karnataka High Court. The next aspect to be considered is whether the amendment to the provisions to section 43B and 36(1)(va) of the Act by the*

Finance Act, 2021, has to be construed as retrospective and applicable for the period prior to 01.04.2021 also. On this aspect, we find that the explanatory memorandum to the Finance Act, 2021 proposing amendment in section 36(1)(va) as well as section 43B is applicable only from 01.04.2021. These provisions impose a liability on an assessee and therefore cannot be construed as applicable with retrospective effect unless the legislature specifically says so. In the decisions referred to by us in the earlier paragraph of this order on identical issue the tribunal has taken a view that the aforesaid amendment is applicable only prospectively i.e., from 1.4.2021. We are therefore of the view that the impugned additions made under section 36(1)(va) of the Act in both the Assessment Years deserves to be deleted."

7. In light of the aforesaid discussions and in the entirety of facts and circumstances of the case and following the consistent decisions taken by the various Benches of the Tribunal, the addition by way of adjustment while processing the return of income u/s 143(1) amounting to Rs. 79,644/- made by the CPC towards the deposit of the employees's contribution towards ESI and PF though paid before the due date of filing of return of income u/s 139(1) of the Act is hereby directed to be deleted.

In the result, the appeal of the assessee is allowed

Order pronounced in the open Court on 15/11/2021.

Sd/-	Sd/-
(विक्रम सिंह यादव)	(संदीप गोसाई)
(Vikram Singh Yadav)	(Sandeep Gosain)
लेखा सदस्य / Accountant Member	न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur
दिनांक / Dated:- 15/11/2021.
*Santosh
आदेश की प्रतिलिपि अग्रेशित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant Alsisar Hotels & Resorts Pvt. Ltd., Jaipur.
2. प्रत्यर्थी / The Respondent- DCIT, Circle-1, Jaipur.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur.
6. गार्ड फाईल / Guard File {ITA No. 167/JP/2021}

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar