

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

BEFORE SH. KUL BHARAT, JUDICIAL MEMBER

(THROUGH VIDEO CONFERENCING)

ITA No.21/Del/2021

[Assessment Year: 2018-19]

Dinesh Chandra Semwal C/o Naresh Agarwal & Associates, 4384/4a, Ansari Road, Daryaganj, New Delhi-110002 PAN-ABLPS2687K	Vs	ITO Ward- 28 (1) New Delhi
(APPELLANT)		(RESPONDENT)
Appellant by	Sh. Naresh Agarwal, CA	
Respondent by	Sh. Om Prakash, SR. DR	
Date of hearing:	29/12/2021	
Date of Pronouncement:	29/12/2021	

ORDER

PER KUL BHARAT JM:

This appeal by the assessee is preferred against the order of the CIT(A)-10, New Delhi dated 07.09.2020 pertaining to A.Y. 2018-19.

2. The assessee has raised following solitary grounds :-

1. Whether the learned CIT(A) was justified in sustaining the addition of Rs 373030.00 made by CPC through adjustment u/s 143(1) on account of late payment of Provident Fund and ESIC u/s 43B of the ACT.

2. Whether the Id CIT(A) was justified in applying ratio of *Bharat Hotels Limited* case in which Hon Delhi High Court has directed the assessing officer to check the dates of payments as per the order of the Hon Court and decide the quantum of amount of disallowance.

3. Whether the CPC has rights to make the adjustments u/s 143(1) to the total income on debatable issues like issues u/s 43B.”

3. At the outset, the only effective ground is regarding sustaining of addition Rs.3,73,030/- on account of late payment PF/ESIC u/s. 43B of the Income Tax Act, 1961 (“the Act”).

4. The Ld. Counsel for the assessee submitted that the issue is squarely covered in favour of the assessee by the judgment of the 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.

5. 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.”*

6. 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:-

6. Decision

- 6.1 *The only ground of appeal taken by the appellant is with regard to adjustment of Rs.3,73,030/- relating to late deposit of contribution received of employees towards EPF and ESIC. On perusal of intimation issued u/s 143(1) dated 16/03/2020, it is noted that CPC has made the adjustment of Rs.3,73,030/- under the head "Income from Business "or Profession" which is on account of disallowance of deduction u/s 36(1)(va) of the Income Tax Act, 1961 as appellant has deposited/credited the employee's contribution of EPF and ESIC beyond the date prescribed in the relevant Act. The above claim is being treated as allowable deduction by the assessee in terms of provisions of section 43B of the Act claiming that same was deposited before the due date of filing of ITR - as per ,provisions of section 139(1) of the Act, hence allowable. Apart from the above, assessee has also placed reliance on the decision of Hon'ble jurisdictional High Court in the case of CIT vs Aimil Ltd and other judicial pronouncements.*
- 6.2 *I have carefully considered the order passed u/s 143(1), facts of the case, grounds of appeal and extant provisions of the Act on the issue involved - disallowance u/s 36(1)(va) for late deposit of employee's contribution towards EPF.*
- 6.3 *The issue in question is expenses related to deposit by the employer in a fund for the purpose of ESI and EPF. This contribution and deposit of money by the employer*

in the designated fund is an allowable expenditure, subject to certain conditions laid down by the legislature.

There are two limbs of this contribution by the employer:

(a) Employer's own contribution

(b) Employee's contribution

Both are to be deposited by the employer only. On behalf of the employee, the employer deposits the money in the designated fund. The respective Acts have provided due dates for such deposits to be made. The allowability of expense related to employers contribution is governed by Section 43B whereas allowability under the Income tax Act related to employees contribution which is governed by section 36(1)(va).

6.4 The actual intent of the legislature regarding these provisions is analyzed as under:

Before Section 43B, there is a headnote which says "certain deductions to be only on actual payment". It means irrespective of the method of accounting followed by the appellant, the deduction will be allowed on actual payment only and in such case the legislature has extended the time limit for payment before the filing of the return which has been brought by the legislature as proviso to section 43B. Section 43B(b) talks about employers contribution only, the relevant provision of section 43B(b) is as under:

"b) 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 employees..."

Therefore, section 43B is clearly and only limited to expenditure relate to employer's contribution which is a business expenditure allowable in the Act, but will be allowed only on actual payment basis. However, the actual payment can be made before the filing of the return.

If the intent of the legislature was to grant and extend this benefit for employees contribution as well the legislature could have very well added it. Nothing has stopped the legislature from adding employees' contribution into this section.

- 6.5 *Section 36(1)(va) talks about other deduction relating to employees' contribution. In the section due date has also been explained by an Explanation to section 36(1)(va). There is no ambiguity and no scope of extrapolating section 36(1)(va) with section 43B. Section 43B clearly talks about employer's contribution whereas section 36(1)(va) talks about employees contribution. If section 36(1)(va) is given the extended meaning then the sanctity of the due dates completely extinguishes. Also, nothing has stopped the legislature to put the same condition in section 36(1)(va) what was put in section 43B. Therefore, there is no scope for any extended meaning in section 36(1)(va) and the AO CPC has rightly disallowed the claim of deduction in respect of*

employees contribution which was late deposited / credited to the employees account.

6.6 *Considering the facts of the case, it is pertinent to discuss the specific provisions of Section 36(1)(va), which are reproduced below:*

36. (1) The deductions provided for in the following clauses shall be allowed in respect of the matters dealt with therein, in computing the income referred to in section 28—

(i), (ia)(ib)...

(ii)(iia)

(iii) (iiia)

(iv)(iva)

(v)

(va) 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.—For the purposes of this clause, "due date" means 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 thereunder or under any standing order, award, contract of service or otherwise;]

6.7 *From the above specific provisions, there remains no ambiguity that appellant was entitled to claim deduction*

u/s 36(1)(va) only if it has credited the amount of contributions received towards PF & ESI from its employees before the due date of the relevant funds, which in this case has not been complied with. Hence, I am of the considered view that appellant was not entitled to claim deduction u/s 36(1)(va) while filing the ITR and the amount of disallowance to be made u/s 36 should have been disclosed in the ITR but appellant failed to do so and the amounts pertaining to employees contributions towards EPF and ESIC which was late deposited was claimed allowable suo moto ignoring the provisions to the Act which tantamount to incorrect claim not allowable.

6.8 *It is further pertinent to mention here that appellant should have made disallowance while filing the ITR in terms of section 36(1)(va) and income under the head "Business or Profession" be computed taking into consideration the above disallowance, but assessee did not comply with the above specific provision of Section 36(1)(va) of the Act knowing fully well that the claim of deduction under the Section is not allowable to it. However, appellant is trying to take shelter of various judicial pronouncements which' were relevant when provisions were not specific and subsequently various amendments have been brought to the statute and as on date Section 36(1)(va) is quite specific which, is reproduced supra according to which deduction under the relevant provision is applicable only when employer*

has credited the sums so received from the employee in the employee's account in the relevant funds before the due dates prescribed in the relevant Acts.

Apart from the above appellant has tried to justify its claim taking into consideration the provisions of Section 43B of the Act which pertained to certain deductions on actual payment basis for which reliance has been placed on provisions of Clause (b) of Section 43B, the provisions of which are as below.

"b) 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 employees..."

6.9 From the above specific provisions it is evident that Clause (b) of Section 43B speaks about employer's contribution towards PF or Superannuation Fund or Gratuity Fund or any other Fund but not about employee's contribution received by the employer towards above funds. Hence, the submissions and reliance placed on above specific provisions of the Act are not applicable to the appellant in respect of employee's contribution.

6.10 Apart from the above, it is further pertinent to mention here that adjustment made by the CPC in respect of late deposit of employees contribution towards EPF and ESIC is in consonance under the scope of Section 143(1)(a) of the Act for which there is specific provision in Sub-Clause (ii) of Clause(a) of Section 143(1) which makes it

crystal clear that the total income or loss shall be computed after making certain adjustments, wherein in Sub-clause (ii), it is provided, “ an incorrect claim, if such incorrect claim is apparent from any information in the return.”

6.11 Thus it is evident that while processing the return u/s 143(1), CPC has rightly made adjustments in respect of incorrect claim of deduction u/s 36(1)(va) of the Act in respect of contributions received from employees by the appellant towards EPF and ESIC, which was not credited to the account of the employees by the due dates provided in the respective Acts. Therefore, I am of the considered view that the adjustment made u/s 143(1) is well within the scope of Section 143(1) as adjustment was in respect of an incorrect claim which finds place under Sub-Clause (ii) of Clause (a) of Section 143(1), mentioned supra, and there is no inconsistency in processing the return and the submissions made by the appellant are factually incorrect.

6.12 In the statement of facts, appellant has placed reliance on the decision in the case of CIT vs Aimil Ltd (2010) 229 CTR 448 and on the basis of the same it is being claimed that the claim of deduction in respect of late deposit of EPF is allowable. In this connection, it is pertinent to mention here that reliance placed on judicial pronouncement in the case CIT vs Aimil Ltd, mentioned supra, by the appellant is preceded by the Hon’ble Delhi High Court’s decision in the case CIT vs Bharat Hotels

Ltd. reported as (2019) 103 Taxmann.com 295 (Delhi) dated 06 Sep 2018, which is the latest decision of the jurisdictional High Court on the subject matter. Recently Hon'ble Delhi ITAT, "B" Bench, in ITA No. 324/Del/2017 dated 25/07/2019 has disposed of the appeal in the case of M/s Eagle Trans Shipping and Logistics India Pvt Ltd vs ACIT, Circle 8(1), New Delhi relying on the above order of the jurisdictional High Court. The detailed relevant portion of Hon'ble Delhi ITAT's order is reproduced below, which is self explanatory wherein it is held that assessee is not entitled for deduction u/s 36(1)(va) of the Act on account of depositing the employees contribution towards ESI and PF as per provisions contained in section 2(24)(x) r.w.s 36(1)(va) after due date.

"8. Before proceeding further, we would like to go through the relevant provisions contained u/s 36(1)(va) of the Act which are extracted for ready perusal as under

"36. (1) The deductions provided for in the following clauses shall be allowed in respect of the matters dealt with therein, in computing the income referred to in section 28—

(va) 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.—For the purposes of this clause, "due date" means 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 thereunder or under any standing order, award, contract of service or otherwise."

9. When we examine the issue in controversy in the light of the provisions contained u/s 36(1)(va) of the Act, it is apparently clear that the assessee would be entitled for deductions qua the sum received from any office employee to which provisions under subsection (x) of clause (24) of section 2 is applied only, if such sum is credited by the assessee to the employees account in the relevant fund or funds on or before the due date. Due date is further defined in the Explanation, which means, the date by which the assessee is required as an employer to credit employees contribution to the employees account in the relevant fund under any Act or rule or order or notification issued thereunder or any standing order or award or service or otherwise. Meaning thereby, in case, employer fails to deposit the entire amount towards employees contribution on account of PF & ESI with concerned department on or

before the due date under PF & ESI, the assessee shall not be entitled for deduction to that extent.

10. Decision of the Hon'ble Supreme Court relied upon by the assessee cited as CIT vs. Atom Extrusions Ltd. (supra) is not applicable to the facts and circumstances^ of the case because Hon'ble Supreme Court has decided the issue in Atom Extrusions Ltd. case qua employers contribution as per section 43B(b) of the Act and not qua employees contribution u/s 36(1)(va) of the Act.

11. Hon'ble jurisdictional High Court in the case of CIT Vs. Bharat Hotels Ltd. (2019) 410 ITR 417 (Delhi) (supra) decided the identical issue qua delayed deposit of employees contribution on account of PF & ESI against the assessee by holding that assessee would be entitled to deduction in terms of section 36(1)(va) of the Act to the extent if the employees contribution on account of PF & ESI is deposited on or before the due date, and the employees contribution on account of PF & ESI deposited beyond the stipulated period would not make the assessee company entitled to claim deduction from its return. For ready perusal, operative part of the judgment of CIT vs. Bharat Hotels Ltd. (supra) is extracted as under:-

“7. The issue here concerns the interplay of Section 2(24)(x) of the Act read with Section 36(1)(va) of the Act alongside provisions of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (especially Regulation 38 of the Employees' Provident Funds

Scheme, 1952) and the provisions of the Employees' State Insurance Act, 1948. The AO had brought to tax amounts which were deducted by the employer/assessee from the salaries and wages payable to its employees, as part of their contributions. It is not in dispute that the employer's right to claim deductions under the main part of Section 43-B of the Act is not an issue. The question the AO had to then decide was whether the amounts deducted from the salaries of the employees which had to be deposited within the stipulated time (in terms of notification/circular dated 19.03.1964 which was modified on 24.10.1973), as far as the EPF contribution went and the period of three weeks as far as the ESI contributions went. The AO made a tabular analysis with respect to the contributions deducted and actually deposited. The cumulative effect of notifications under the Employees' Provident Funds Act, 1952 and the Employees State Insurance Act, 1948 was that in respect of the EPF Scheme contributions the deductions were to be deposited within 15 days of the succeeding wage period with a grace period of 5 days; for ESI contributions the deposit with the concerned statutory authority had to be made within three weeks of the succeeding wage month/period. The CIT in this case confirmed the additions - made by the AO based on the entire amounts that were disallowed. The IT AT however granted complete relief.

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.*
9. *In view of this discussion, the Revenue's appeal is partly allowed. The AO is directed to examine the contributions made with reference to the dates when they were actually made and grant relief to such of them which qualified for such relief in terms of the prevailing provisions and notifications. We also clarify that the assessee would be entitled to deduction in terms of Section 36(1)(va) of the Act."*
12. *In view of what has been discussed above and following the decision rendered by the Hon'ble jurisdictional High Court in case of CIT vs. Bharat Hotels Ltd. (supra), we are of the considered view that the assessee company is*

not entitled for deduction of Rs.4,29,110/- u/s 36(1)(va) of the Act claimed on account of depositing the employees contribution towards ESI & PF as per provisions contained u/s 2(24) (x) read with section 36(1)(va) after due date which is evident from table extracted in preceding para no. 5. So, the case laws relied upon by the Id. AR for the assessee is not applicable to the facts and circumstances of the case. Consequently, finding no illegality or perversity in the impugned order passed by the Id. CIT (A), appeal filed by the assessee is hereby dismissed. "

6.13 *In the written submissions, appellant has placed reliance on the decision of Hon'ble High Court of Delhi in the case CIT vs. Aimil Ltd. and Hon'ble Apex Court's decision in the cases CIT vs. Vinay Cement Ltd. In this connection it is pertinent to mention here that the decision of Bharat Hotels Ltd., delivered by the Hon'ble jurisdictional High Court is the latest decision, thus reliance placed by the appellant on earlier decisions of the Jurisdictional Court became of no help to the appellant. It is further mentioned that Hon'ble Delhi ITAT in the case M/s Eagle Trans Shipping and Logistics India Pvt Ltd vs ACIT, Circle 8(1), New Delhi has lied upon the decision of Hon'ble Delhi High Court in the case of M/s Bharat Hotels Ltd. and 1 the above order of ITAT, facts of CIT vs. Alom Extrusions Ltd (which has also been relied by appellant) have been distinguished holding that the Hon'ble Supreme Court has decided the*

issue in Alom Extrusions Ltd. case qua employers contribution as per section 43B(b) of the Act and not qua employees contribution u/s 36(1)(va) of the Act. In the written submissions, appellant has placed reliance on the decision of Hon'ble Supreme Court in the case CIT vs. Vinay Cement Ltd in which the SLP filed by the department was dismissed. In this connection, it is pertinent to mention here that recently Hon'ble Apex Court has given a landmark decision observing that the dismissal of a SLP in limine simply implies that the case before this court was not considered worthy of examination for a reason, which may be other than the merits of the case. Reliance in this regard is placed on the decision of Hon'ble Apex Court dated 01/03/2019 in civil Appeal No. 2432 of 2019 in the .case Khoday Distilleries Ltd. (Now Known As Khoday India Limited) and others vs Shri Mahadeshwara Sahakara Sakkare Karkhane Ltd. Kollegal (Under Liquidation) Represented by the Liquidator with Civil Appeal No. 2433 of 2019. Thus, the reliance placed on the above judicial pronouncements wherein the SLP of the department was dismissed does not make it a case that subsequent orders of jurisdictional High Court or ITAT cannot be relied upon.

6.14 Taking into consideration the facts of the case and latest judicial precedence available on record, I am of the considered view that the appellant is not entitled for deduction u/s 36(1)(va) in respect of delayed payment

of employee's contribution towards EPF and ESIC before the due date of filing of ITR. The appellant is keeping Govt, money in his possession which is against the spirit of the law. Also there will be no sanctity for any due date if the same is allowed till another date. Thus, the ground of appeal taken by the appellant is dismissed.

7. *In the result, the appeal is dismissed."*

7. 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)."*

8. 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.

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

Order pronounced in the open court on 29.12.2021

Sd/-

**(KUL BHARAT)
ACCOUNTANT MEMBER**

*Neha *

Copy forwarded to:

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

ASSISTANT REGISTRAR
ITAT NEW DELHI