

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL,
JAIPUR BENCHES (SMC), JAIPUR

श्री विजय पाल राव, न्यायिक सदस्य के समक्ष
BEFORE: SHRI VIJAY PAL RAO, JUDICIAL MEMBER

आयकर अपील सं./ ITA No. 252/JP/2021
निर्धारण वर्ष / Assessment Year: 2019-20

Shri Santosh Mahla, Prop.-PC Manpower Solution, F-1/203 Eldeco Eden Park, Neemrana, Alwar.	बनाम Vs.	C.P.C., Bengaluru/ I.T.O., Ward-Behror.
स्थायी लेखा सं./ जीआईआर सं./ PAN/GIR No.: DSFPM 8800 J		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by: Shri P.C. Parwal (CA)
राजस्व की ओर से / Revenue by : Smt. Monisha Choudhary (JCIT)

सुनवाई की तारीख / Date of Hearing : 05/01/2022
उदघोषणा की तारीख / Date of Pronouncement : 05/01/2022

आदेश / ORDER

PER: VIJAY PAL RAO, J.M.

This appeal by the assessee is directed against the order dated 15/09/2021 of Id. CIT(A), National Faceless Appeal Centre, Delhi (NFAC) for the A.Y. 2019-20. The assessee has raised following grounds of appeal:

- "1. The Id. CIT(A), NFAC has erred on facts and in law in confirming the addition of Rs. 10,47,540/- u/s 36(1)(va) on account of delayed payment of employees contribution towards PF. He has further erred in making the addition by not following the decision of jurisdictional High Court.*

- 1.1 *The Id. CIT(A), NFAC has erred on facts and in law in confirming the above additoni made while processing the return u/s 143(1)(a) ignoring that such adjustment on which different High Courts have taken different views cannot be a subject matter of adjustment u/s 143(1)(a)(iv).*
2. *The appellant craves to alter, amend and modify any ground of appeal.*
3. *Necessary cost be awarded to the assessee.”*

2. The solitary issue arises in this appeal of the assessee is regarding disallowance of employees contribution of PF and ESI deposited belatedly but before due date of filing of return of income U/s 139(1) of the Income Tax Act, 1961 (in short, the Act).

3. The assessee filed his return of income on 30/09/2019 which was processed U/s 143(1) of the Act whereby an adjustment was made on account of disallowance of claim of deduction with respect to employees contribution towards PF and ESI deposited belatedly. The assessee challenged the said adjustment before the Id. CIT(A) and contended that as per the binding precedents if the payment is made in the government account before due date of filing of return of income U/s 139(1) of the Act then as per provisions of Section 43B of the Act, no disallowance is made. The Id. CIT(A) did not accept this contention of the assessee and confirmed the disallowance by considering the amendment in Section

36(1)(va) of the Act whereby an explanation (2) as well as explanation (5) to Section 43B of the Act was inserted being retrospective in nature.

4. Before the Tribunal, the Id. AR of the assessee has submitted that this issue is covered by the various decisions of this Tribunal as well as the Hon'ble High Courts. He has relied upon the decision of the Coordinate Bench of this Tribunal in the case of M/s Kogta Financial (India) Ltd. Vs CPC order dated 11/11/2021 in ITA No. 182/JP/2021.

5. On the other hand, the Id. DR has submitted that the amendment to Section 36(1)(va) as well as 43B of the Act vide Finance Bill, 2021 is clarificatory in nature and therefore, applicable with retrospective effect. The Id. DR has submitted that the Id. CIT(A) has relied upon the decision of the Delhi Benches of the Tribunal in the case of Vedvan Consultants Pvt. Ltd. in ITA No. 1312/Del/2020 order dated 26/08/2021.

6. In rejoinder, the Id. AR has submitted that the Delhi Benches of the Tribunal in subsequent decisions have decided this issue in favour of the assessee after considering the said decision in the case of of Vedvan Consultants Pvt. Ltd. (supra). He has relied upon the decision of the Delhi Benches of the Tribunal in the case of Chatru Mal Garg Vs ACIT in ITA No. 850/Del/2021 order dated 29/10/2021.

7. I have considered the rival submissions as well as the relevant material on record. There is no dispute that prior to the amendment brought by the Finance Bill, 2021 in Section 36(1)(va) as well as Section 43B of the Act, the issue of allowability of employees contribution towards PF and ESI and depositing the same in the government account before the due date of filing of return of income U/s 139(1) of the Act was settled and decided in favour of the assessee by various binding precedents of Hon'ble High Courts including the Jurisdictional High Court. The limited controversy is whether the amendment brought to Section 36(1)(va) as well as 43B of the Act is applicable retrospective or from assessment year 2021-22 as it is specifically stated in the memorandum of Finance Bill, 2021. At the outset, it is noted that the Coordinate Bench of this Tribunal in the case of M/s Kogta Financial (India) Ltd. Vs CPC (supra) has considered this issue in para 5 to 7 as under:

"5. We have heard the rival contentions and perused 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' 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 assesseees 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, furthermore 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 assesseees 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 assesseees 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 Corporation 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 Id. 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 Id 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' 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 Id 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, I 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 2018-19 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. 37,62,586/- so 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."

Thus, it is clear from the above cited decision that this Tribunal has considered various decisions on this issue and by following decisions of

the Coordinate Benches of the Tribunal, this issue was decided in favour of the assessee by holding that amendment in Section 36(1)(va) as well as Section 43B of the Act by way of inserting the explanation vide Finance Bill, 2021 are applicable only from A.Y. 2021-22 and subsequent assessment years and therefore, the said amendment is not applicable to the assessment year under consideration.

8. Similar view has been taken by the Delhi Benches of the Tribunal in the case of Chatru Mal Garg Vs ACIT (supra) in para 7 as under:

“7. I have heard the rival submissions and perused the materials on record. The issue in the present ground is with respect to disallowance under section 36(1)(va) of the Act. It is an undisputed fact that there has been slight delay in the deposit of employees’ contribution of PF and ESI by the assessee and the contribution have been deposited beyond the due date prescribed by the relevant authorities but at the same time it is also a fact that the amounts have been deposited with the appropriate authorities by the assessee before filing the return of income for the relevant assessment year. I find that Hon’ble Delhi High Court in the case of CIT vs. AIMIL Ltd. (supra) has held that no disallowance under section 36(1)(va) of the Act is called for when the amounts are deposited before filing the return of income. Similar view has also been taken by the Hon’ble Punjab & Haryana High Court in the case of CIT vs. Hemla Embroidery Mills (P) Ltd (supra) and Indian Geotechnical Services (supra). As far as the applicability of amendment made by Finance Act 2021 is concerned, I find that the Co-ordinate Bench of Tribunal in the case of Indian Geotechnical Services (supra) has held that amendment made by Finance Bill 2021 shall take effect from 1st April 2021

and will accordingly apply to A.Y. 2021-11 and subsequent years. In the present case assessment year involved is 2018-19 and therefore following the aforesaid decision in the case of Indian Geotechnical Services (supra), I am of the view that the amended provisions would have no application to the case under consideration. Before me, Learned DR has relied on the decision of Co-ordinate Bench of Tribunal in the case of Vedvan Consultants Pvt. Ltd. (supra). 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. I therefore following the decision of High Courts cited hereinabove and the decision of the Co-ordinate Bench of Tribunal, I am of the view that no addition u/s 36(1)(va) of the Act is called for in the present case. Therefore I direct the AO to delete the addition. Thus the ground of assessee is allowed.

Thus, it is clear that the Delhi Benches of the Tribunal has considered the earlier decision of the Tribunal in the case of Vadvan Consultants Pvt. Ltd. (supra) which was relied upon by the Id. CIT(A) as well as the Id. DR and the issue was decided by following the decisions of Hon'ble Delhi High Court and Hon'ble Punjab & Haryana High Court and the decisions of the Division Bench of the Delhi Tribunal in the case of Indian Geotechnical Services in ITA No. 622/Del/2018 order dated 27/08/2021. Accordingly, in view of the above discussions as well as following the decisions of the Coordinate Benches of the Tribunal, this issue is decided in favour of the assessee and consequently, the disallowance made on account of employees contribution towards PF &

ESI deposited before due date of filing of return of income U/s 139(1) of the Act is deleted.

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

Order pronounced in the open court on 05th January, 2022.

Sd/-
(विजय पाल राव)
(VIJAY PAL RAO)
न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur

दिनांक / Dated:- 05th January, 2022.

*Ranjan

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- Shri Santosh Mahla, Alwar.
2. प्रत्यर्थी / The Respondent- The C.P.C., Bengaluru/ I.T.O., Ward-Behror.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त(अपील) / The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA No. 252/JP/2021)

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar