

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES "F" : DELHI

BEFORE SHRI ANIL CHATURVEDI, ACCOUNTANT MEMBER
AND
SHRI AMIT SHUKLA, JUDICIAL MEMBER

ITA.Nos.1245 & 1246/Del./2021
Assessment Years 2018-19 & 2019-20

M/s. Ramesh Electric Works, 53/1, Arjun Nagar, Near Safdarjung Enclave, New Delhi PIN - 110 029. PAN AAOFR7371R (Appellant)	vs.	The DCIT, CPC, Bangalore - 560 500. (Respondent)
--	-----	---

ITA.No.1386/Del./2021
Assessment Year 2018-19

M/s. XO Footwear P Ltd., A-122, Mangolpuri Industrial Area, Phase-II, New Delhi PIN - 110 034. PAN AAACX0456E (Appellant)	vs.	The DCIT, CPC, Bangalore - 560 500. (Respondent)
--	-----	---

For Assesseees :	Shri Suresh Gupta, C.A. & Shri Vivek Mittal, C.A.
For Revenue :	Shri Sanjay Tripathi, Sr. D.R.

Date of Hearing :	24.01.2022
Date of Pronouncement :	31.01.2022

ORDER

PER BENCH :

These appeals by the assessee are preferred against the orders of the Commissioner of Income Tax (Appeals), National Faceless Appeal Centre (NFAC) - Delhi dated 03.08.2021 (for ITA Nos. 1245 & 1246/Del/2021) & 27.09.2021 (for ITA No. 1386/Del/2021) pertaining to Assessment Years 2018-19, 2019-20 & 2018-19 respectively.

2. Before us, at the outset, Learned A.R. submitted that the aforesaid Appeal Nos.1245 & 1246/Del./2021 relate to the same assessee [i.e., M/s. Ramesh Electric Works, New Delhi] and the issue involved in both the appeals are identical except for the difference in assessment year and the amounts involved. As far as ITA.No.1386/Del./2021 is concerned which is with respect to M/s. XO Footwear P. Ltd., New Delhi, he submitted that though the assessee is different, but, the issues involved in

that appeal are also identical to the issues raised in M/s. Ramesh Electric Works, New Delhi. He, therefore, submitted that the submissions made and argued in one appeal, would be applicable to other appeals also and therefore all the appeals can be heard together. The Ld. D.R. did not controvert to the aforesaid submissions of the Learned A.R. We, therefore, for the sake of convenience, proceed to dispose of all the appeals by way of consolidated order, but, however, proceed with narrating the facts for the A.Y. 2018-2019 in ITA No.1245/Del./2021.

3. The assessee is a partnership firm engaged in the business of execution of Government works contracts. The assessee electronically filed its return of income for the A.Y. 2018-19 on 09.10.2018 declaring income of Rs.94,23,418/-. Thereafter, the CPC Bangalore issued an intimation dated 16.10.2019 under section 143(1) of the I.T. Act, 1961 wherein disallowance of Rs.20,52,429/- was made on account of late deposit of ESI & PF and thus the total

income was determined at Rs.1,14,75,847/-. Aggrieved by the order of the A.O. assessee carried the matter before the Ld. CIT(A) who vide order dated 03.08.2021 in Appeal No.CIT(A), Delhi-10/10180/2019-20 dismissed the appeal of the assessee. Aggrieved by the order of the Ld. CIT(A), the assessee is now before us and has raised the following grounds:

1. *“The Ld CIT(A) has grossly erred both on facts and in law in upholding impugned addition of Rs.20,52,429/- u/s 36(1)(va) of the IT Act for delayed deposit of employee shares of ESI/PF ignoring the fact that such payments are paid before due date of filling of return of income u/s 139(1) of IT Act and therefore are allowable under law as per decision of jurisdictional Delhi High Court. (Tax effect: Rs. 12,42,091/-).*
2. *The Ld CIT(A) has grossly erred both on facts and in law in upholding impugned addition of Rs.20,52,429/- u/s 36(1)(va) of the IT Act for delayed deposit of employee shares of ESI/PF in view of the Explanation*

2 inserted in section 36(1)(va) by Finance Act 2021 ignoring the fact that above Explanation is not applicable for the year under consideration. (Tax effect: Rs. 12,42,091/-)

3. *Whether on the facts and in the circumstances of the case and position on law, the Education Cess and the Secondary and Higher Education Cess amounting to Rs.1,15,677/- is a disallowable expenditure u/s 40(a)(ia) of the Act, 1961. (Tax effect : Rs.31,785/-) The above ground is an additional ground.*

4. *The appellant craves leave to add, delete, modify/amend the above grounds of appeal with the permission of the Hon'ble appellant authority."*

4. The similar grounds have been raised in ITA No.1246/Del/2021 for A.Y. 2019-20 & 1386/Del/2021 for A.Y. 2018-19.

5. Ground No.1& 2 are with respect to the disallowance u/s 36(1)(va) of the Act.

6. Before us, Learned AR submitted that during the year under consideration that there was delayed deposit of employees contribution of PF/ESIC with the appropriate authorities.

7. Before us, the Learned A.R. pointed to the order of the Ld. CIT(A) in para 2.2.2 and submitted that though there has been delay in the deposit of Employees Contribution of PF/ESIC, but, the same has been deposited with the appropriate authorities before the filing of return of income by the assessee. He, therefore, submitted that since the amount have been deposited before the filing of the return of income, no disallowance is called for and for the aforesaid proposition, he relied on the decision in the cases of *Azamgarh Steel & Power vs CPC* in ITA No.1626/Del/2020 dated 31.05.2021 and *CIT vs. AIMIL Ltd.* [2010] 188 Taxman 265 (Delhi) and the decision of

Delhi Tribunal in the case of Ajay Mehta, Gurgaon, Haryana vs. ADIT, CPC Bangalore vide ITA.No.849/Del/2021, order dated 29.10.2021.

8. The Ld. D.R. on the other hand supported the orders of the lower authorities and also placed reliance on the decision of Hon'ble Tribunal in the case of Vedvan Consultants Pvt. Ltd. vs DCIT in ITA No.1312/ Del/2020 order dated 26.08.2021. He also submitted that the amendment brought out by Finance Act 2021 would be applicable to the present case as by the amendment it has been clarified that provisions of Section 43B shall not apply and shall be deemed never to have been applied to a sum received by the assessee from any of his employees to which the provisions of sub clause (x) of Clause (24) of Section 2 applies.

9. We have heard the rival submissions and perused the material available on record. The issue in the present

grounds is with respect to the delayed deposit of PF/ESIC contributions. Before us, the Learned AR has pointed to the statement of the deposits made during the year and from that table he has pointed out that though there has been delay in deposit of the PF/ESIC Contributions, but, all the amounts have been deposited with the appropriate authorities before filing of return of income by the assessee. We find that the various Benches of the Tribunal at Delhi and other Tribunal have held that the delayed deposits of PF & ESIC before the date of filing of return of income is an allowable expenditure and for which reliance was placed on the decision of Hon'ble Delhi High Court in the case of AIMIL Ltd. (supra). As far as reliance by Learned DR on the amendment brought out by Finance Act 2021 is concerned, "notes on clauses" to the Finance Bill 2021 clearly states that the amendment will take effect from 1st April 2021 and will apply in relation to the assessment year 2021-22 and subsequent assessment year. In such a situation, we are of the view that since the assessment year under consideration is A.Y. 2018-19, the amendment does not apply to the

assessment year under consideration. As far as the reliance of Revenue on the decision of Vedvan Consultants Pvt. Ltd. (supra) is concerned, we find that the various Division Benches of the Delhi & other Tribunal have held the delayed deposits of PF/ESIC Contributions to be allowable if the same are deposited with the appropriate authorities before filing of return of income by the assessee. Further, 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. We, therefore, following the decision rendered by Hon'ble Apex Court in the case of M/s. Vegetable Products Ltd. (supra) and AIMIL Ltd. (supra), are of the view that no disallowance was warranted in the present case. We, therefore direct the AO to delete the addition. **Thus the assessee's ground is allowed.**

10. **Ground No.3** is with respect to the claim of Rs.1,15,677/- paid towards Education Cess as an allowable expenditure.

11. Learned A.R. submitted that during the relevant assessment year assessee has paid education cess amounting to Rs. 1,15,677/- under the normal provisions of the Act but was not claimed as an expenditure. He submitted however that Ground was not raised before CIT(A) and the assessee is now raising this ground before the ITAT for the first time. He submitted that Ground raised is a legal ground which was be raised at any time by the assessee and it does not require any investigation of fresh facts. He further submitted that in the interest of justice, the ground be admitted and the same be adjudicated. In support of his contentions, he relied on the decision of Hon'ble Apex Court in the case of NTPC [1998] 229 ITR 383 (SC).

12. The Ld. D.R, however, objected for admission of the ground and submitted that the plea was never made before the lower authorities.

13. On the issue of admission of additional ground not raised before lower authorities, we have heard the rival submissions and perused the material on record. We find force in the arguments of the Learned A.R. that the grounds raised is legal in nature. In view of the Judgment of Hon'ble Supreme Court in the case of NTPC (supra), wherein the Hon'ble Apex Court has held that *"the purpose of the assessment proceedings before the taxing authorities is to assess correctly the tax liability of an assessee in accordance with law"*. It was further held that *"as a result of a judicial decision given while the appeal is pending before the Tribunal, it is found that a non-taxable item is taxed or a permissible deduction is denied, we do not see any reason why the assessee should be prevented from raising that question before the tribunal for the first time, so long as the*

relevant facts are on record in respect of that item". In view of the aforesaid decision, we admit the ground of appeal.

14. On the merits he submitted that the Hon'ble Rajasthan High Court in the case of Chambal Fertilisers and Chemicals Ltd. vs. JCIT (D.B ITA No.52/2018), vide order dated 31.07.2018 has held that education cess is an allowable deduction while computing the income under the head "profits and gains from business or profession" as it does not fall within section 40(a)(ii) of the Act, 1961. He submitted that the Hon'ble Bombay High Court in the case of Sesa Goa Ltd. vs. JCIT: 117 taxmann.com 96 has also held that education cess is to be an allowable expenditure. He, therefore, submitted that education cess being not in the nature of tax and not being disallowable expenditure under section 40(a)(ia) of the I.T. Act, 1961, the claim of deduction be allowed.

15. The Ld. D.R. did not controvert to the submissions but however submitted that the aforesaid ground is raised for the first time before Hon'ble ITAT and it was not raised before lower authorities.

16. We have heard the rival submissions and perused the material available on record. The issue in the present ground is with respect to the claim of Rs. 1,15,677/- on account of deduction on education cess. Before us, it is the Learned A.R's contention that assessee has paid education cess which was not claimed as deduction in the return of income filed by the assessee and that now assessee seeks its deduction. We find that similar issue arose in the case of EXL Services.com India Pvt. Ltd., New Delhi vs., ACIT, Large Taxpayer Unit, Circle – 1, New Delhi wherein the Coordinate Bench of the Tribunal in ITA.No.7392/Del./2018 order dated 06.09.2021 decided the issue in favour of the assessee by observing as under :

“22. We have heard the rival submissions and perused the materials available on record. The issue in the present additional ground is with respect to claim of deduction of Rs.70,98,828/- on account of payment of education cess. We find that identical issue arose in assessee’s own case and the Co-ordinate Bench of Tribunal decided the issue in favour of the assessee by observing as under :

“33. By way of additional ground, the assessee has claimed deductibility of education cess.

34. Before us, the ld. counsel for the assessee stated that in the return of income filed for relevant A.Ys, the assessee did not claim deduction for education cess paid before the due date for filing return of income for subject A.Ys It is the say of the ld. counsel for the assessee that the Hon'ble Rajasthan High Court in the case of Chambal Fertilizers and Chemicals Limited in ITA

No.52/2018 order dated 31.07.2018 has held that education cess is an allowable deduction while computing the income under the head “Profits and gains from profession or business”.

35. *Even the CBDT, in its Circular No. 91/58/66-ITJ(19) dated 18.05.1967 has clarified that the word “Cess” has been omitted from clause and effect of omission of the word “Cess” is that only taxes paid are to be disallowed in the assessments for the years 1961-63 onwards.*

36. *In light of the decision of the Hon'ble Rajasthan High Court [supra] we direct the Assessing Officer to allow claim of deductibility of cess from the income in the captioned A.Ys. Additional ground in all the appeals is allowed.”*

23. *We find that facts of the case in the year under consideration are identical to that of the earlier years. Further no distinguishing feature in the facts of the case in the year under consideration and that of the earlier*

years has been pointed out by the Revenue. Before us, Revenue has also not placed any material on record to demonstrate that the ITAT orders in assessee's own case for earlier years on identical issue has been stayed/ set aside/ overruled by higher judicial forum. We therefore, following the order of the Tribunal in assessee's own case for earlier years and for similar reasons direct the AO to allow the claim of deductibility of cess amounting to Rs.70,98,828/-. Thus the ground of the assessee is allowed."

17. Before us, Revenue has not placed any material to demonstrate that the order of the Tribunal in the case of EXL Services Company Ltd. (supra) has been set aside / stayed or overruled by higher judicial forum. Further, Revenue has also not pointed to any distinguishing facts in the present case and that of EXL Services.com Ltd. (supra). We therefore, respectfully following the decision of the Coordinate Bench of the Tribunal in the case of EXL Services.com India Pvt. Ltd., New Delhi vs., ACIT, Large

Taxpayer Unit, Circle – 1, New Delhi (supra), direct the AO to allow the claim of deduction. **Thus the ground of assessee is allowed.**

18. **In the result, ITA.No.1245/Del./2021 of the assessee is allowed.**

19. As far as the assessee's appeal for the A.Y. 2019-20 [ITA.No.1246/Del./2021] is concerned, it is the submission that facts are identical to that of A.Y. 2018-19.

20. Therefore, respectfully following the reasons for decision taken in the A.Y. 2018-19, **we allow the appeal of the assessee for the A.Y. 2019-20.**

21. **In the result, ITA.No.1246/Del./2021 of the assessee is allowed.**

22. As far as ITA No.1386/Del/2021 for A.Y. 2018-19 in the case of M/s. XO Footwear P. Ltd. is concerned. Since

both the parties before us have admitted that the facts in the present case are identical to that of ITA No.1245/Del./2021 in the case of M/s. Ramesh Electric Works for A.Y. 2018-19, therefore, respectfully following the reasoning given while deciding the issue in ITA No.1245/Del./2021 for the A.Y. 2018-19 and for similar reasons **we allow the appeal of the assessee.**

23. **In the result, ITA.No.1386/Del./2021 of the assessee is allowed.**

24. **To sum-up, all the appeals of the Assessee are allowed.**

Order pronounced in the open Court on 31.01.2022.

Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER

Sd/-
(ANIL CHATURVEDI)
ACCOUNTANT MEMBER

Delhi, Dated 31st January, 2022

VBP/-

Copy to

1.	The appellant
2.	The respondent
3.	CIT(A) concerned
4.	CIT concerned
5.	D.R. ITAT 'F' Bench, Delhi
6.	Guard File.

// By Order //

Assistant Registrar : ITAT Delhi Benches :
Delhi.