

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "G" BENCH: NEW DELHI**

**BEFORE SH. RAMA KANTA PANDA, ACCOUNTANT MEMBER
AND SH. NARENDER KUMAR CHOUDHRY,
JUDICIAL MEMBER**

**ITA Nos. 1626 & 1627/Del/2021
[Assessment Years: 2018-19 & 2019-20]**

Sunny International
Limited
C/o Rajiv Goel &
Associates,
SCO 823-824, 1st Floor,
Sector 22A, Chandigarh.
PAN- AATCS8977L

Vs DCIT, Centralised Processing
Centre (CPC), Bengaluru.

Appellant

Respondent

Appellant by	Sh. Dhruv Goel, CA
Respondent by	Sh. Umesh Takyar, Sr. DR
Date of hearing	25.01.2022
Date of pronouncement	31.01.2022

ORDER

PER N. K. CHOUDHRY, JM:

The Assessee has preferred these appeals against the separate orders dated 16.09.2021 and 20.09.2021 impugned herein passed by the CIT(A), National Faceless Appeal Centre (NFAC), Delhi, for the assessment years 2018-19 and 2019-20 respectively u/s.250 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act').

2. The issue involved in the instant appeals relates to the deposit of employees' contributions qua ESI, PF and Labour Welfare Fund after the due date as prescribed in the relevant Acts, however, before the due date of filing of return of income u/s.139(1) of the Act, resulting into following disallowances by the Assessing Officer.

AY	ESI Contribution	PF Contribution	Labour Welfare contributions
2018-19	Rs 91,85,979/-	8,45,841/-	1,61,700/

AY	ESI Contribution	PF Contribution	Labour Welfare contributions
2019-20	Rs 30,28,292	3,83,269	1,46,870

3. Against the above disallowances, the Assessee preferred first appeals before the CIT(A) who vide impugned order, partly sustained the additions of 1,01,93,520/- and 35,58,430/- made by the AO for the assessment years 2018-19 and 2019-20 respectively.

4. Being aggrieved, the Assessee is in appeals before us.

5. Having heard the parties and perused the material available on record. The Assessee raised the arguments against the impugned order, whereas the Ld. DR vehemently supported the same. The CIT(A) while partly upholding the disallowances/additions qua employee's contributions towards PF, ESI and Labour Welfare Fund, mainly focused on two aspects/determinations-

(i) Non-applicability of the provisions of Section 43B of the Act to the employee's share qua ESI, PF and Labour Welfare Fund

And

(ii) Applicability of the amended provisions of Sections 36(1)(va) and 43B of the Act wherein Explanations have been inserted by Finance Act, 2021.

5.1 The Assessee before the Id. Commissioner claimed as the Assessee has deposited the employee's contributions towards ESI, PF and labour welfare Fund before the due date of filing of the return of income u/s 139 of the Act, hence no disallowance is warranted. In support of its contention the Assessee also relied upon various judgments rendered by Hon'ble Apex Court, which includes Rajasthan State Beverages Ltd (2017) 84 Taxmann.com 185 (SC), CIT Vs. Alom Extrusion Ltd (2010) 1 SCC 489, CIT Vs. Vinay Cement Ltd 213 CTR 268 and by Hon'ble Delhi High Court in the case of CIT Vs. AIMIL Ltd 321 ITR 508.

5.2 We observe that although the Id. CIT(A) has considered the judgments relied upon by the Assessee as observed in its order at para no. 5.3 to the effect "*however the case law quoted by the Appellant and some other Courts have applied the provision of Section 43B on employee contribution as well and held that if such payment(Employees' contribution) is made before the due date of filling of Return of Income, no disallowance should be made u/s 36 of the Act*", however declined the claim of the Assessee while relying upon judgments rendered against the contention raised by the Assessee, by Hon'ble High Courts in the case of Gujrat State Road Transport Corporation Ltd. {Tax Appeal no. 637 of 2013 reported in [2014] 41 taxmann.com 100(Gujrat) , CIT VsMerchem Ltd. (2015) 378 ITR 443(Kerala) and Unifac Management Services(India) P. Ltd. (2018) 100 taxmann.com 2414(Madras) .

5.3 Admittedly there is plethora of judgments in favour of the Assessee's contention and of the Revenue. The controversy with regard to divergent views of different High Courts, has been settled by the Hon'ble Apex Court in the case of CIT Vs. M/s. Vegetables Products

Ltd. (88 ITR 192) by laying down the dictum '*if two reasonable constructions of a taxing provision are possible that construction which favours the Assessee must be adopted.*'

5.4 Admittedly the issue under controversy travelled upto the Hon'ble Apex Court in the cases of Rajasthan State Beverages Ltd (supra), CIT Vs. Alom Extrusion Ltd (supra) and CIT Vs. Vinay Cement Ltd (supra) and the Hon'ble Apex Court clearly held the amount claimed on payment of PF and ESI if deposited on or before due date of filing of returns then the same cannot be disallowed u/s 43B or u/s 36(1)(va) of the Act.

5.5 Even Hon'ble Punjab and Haryana High Court in the case of CIT Vs. M/s Hemla Embroidery Mills (P) Ltd. (366 ITR 167) (P&H HC) and in the case of CIT Vs. M/s Mark Auto Industries Ltd. (358 ITR 43) (P&H HC) has clearly held that the Assessee is entitled to claim deduction of employee's share of ESI & PF u/s.43B of the Act, if the same has been deposited prior to the filing of return of income u/s.139(1) of the Act.

Jurisdictional High Court as well, in the case of CIT Vs. AIMIL Ltd (supra) affirmed the action of the ITAT in deleting the addition relating to employees' contribution deposited before the due date of filing of return, in respect of Provident Fund and ESI made by the Assessing Officer under Section 36(1)(va) of the Income Tax Act, 1961.

Again Jurisdictional High Court in the case of PCIT vs., Pro Interactive Service (India) Pvt. Ltd., vide ITA.No.983/2018 order dated 10.09.2018 while following the decision in the case of CIT Versus AIMIL Ltd., (supra), has held *that legislative intent was/is to ensure that the amount paid is allowed as expenditure only when payment is actually made. It was further held that it was not the legislative intent and*

objective to treat belated payment of Employees' Provident Fund & Employees' State Insurance Scheme as deemed income of the employer under section 2(24)(x) of the I.T. Act, 1961.

From the aforesaid Judgments of the Hon'ble High Courts, it is clear that the Hon'ble Courts have not drawn any distinction between the employee's and employer's share qua PF & ESI contributions, hence, first determination of the Ld. CIT(A) qua non-applicability of the provisions of Section 43B of the Act to the employee's share qua PF, ESI and Labour Welfare Fund is unsustainable.

5.6 Now, coming to the second aspect/determination made by the CIT(A) to the effect *that now position has been further clarified by the amendments brought in the Finance Act 2021 by inserting the Explanation 2 in Section 36(1)(va) and 5 in section 43B of the Act of the Act.* For better clarification and ready reference the Explanations 2 and 5 inserted in sections 36(1)(va) and 43B of the Act respectively, are reproduced herein, which reads as under :-

Section 36(1)(va)-

“Explanation 2.— For the removal of doubts, it is hereby clarified that the provisions of section 43B shall not apply and shall be deemed never to have been applied for the purposes of determining the “due date” under this clause.”

Section 43B-

“Explanation 5.—For the removal of doubts, it is hereby clarified that the provisions of this section 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.”

5.7 We observe that various benches of the ITAT including Hyderabad Bench in the case of Value Momentum Software Services Pvt. Ltd. (ITA No.2197/Hyd/2017 decided on 19.05.2021), have taken into consideration the identical issue qua applicability of the amendment to Sections 36(1)(va) and Section 43B of the Act, by inserting Explanations by the Finance Act, 2021 and clearly held that the amendment shall be applicable from 1st April, 2021 onwards . It is also relevant to note that the CBDT has also issued Memorandum of Explanation qua applicability of the amended provisions of Sections 36(1)(va) & 43B of the Act w.e.f. 1st April, 2021 and Assessment Year 2021-21 onwards, hence there is no doubt qua applicability of the amended provisions referred above, prospectively.

5.8 On the aforesaid discussion, the second aspect as considered by the Id. CIT(A) qua applicability of the amended provisions of Sections 36(1)(va) and 43B of the Act to the cases in hand, is also unsustainable.

5.9 In view of the above discussions, the disallowances to the tune of Rs. 1,01,93,520/- and 35,58,430/- made by the AO for the assessment years 2018-19 and 2019-20 respectively and confirmed by the CIT(A) are not sustainable and, hence, the same stands deleted.

6. In the result, both the appeals of the Assessee are allowed.

Order pronounced in the open court on 31-01-2021.

-Sd/-

(R. K. PANDA)
ACCOUNTANT MEMBER
31-01-2021

-Sd/-

(N. K. CHOUDHRY)
JUDICIAL MEMBER

MP

Copy forwarded to:

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

ASSISTANT REGISTRAR
ITAT, NEW DELHI