

**IN THE INCOME TAX APPELLATE TRIBUNAL, JODHPUR
BENCHES, JODHPUR BENCH, JODHPUR**

**BEFORE SHRI N.K.SAINI, VICE PRESIDENT AND
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER**

Hearing though video Conferencing

ITA Nos. 108 & 109/Jodh/2021

Assessment Years : 2018-19 & 2019-20

Akbar Mohammad Prop. M/s Mohd. Rafique Associates, Fort Road, Nagaur, Near ICICI Bank, Nagaur, 341001	Vs.	The ACIT, CPC, Banglore
PAN NO: ATOPM0888P		
Appellant		Respondent

Assessee by : Shri Manoj Gupta, CA
Revenue by : Sh. S.M. Joshi, Sr. DR

Date of Hearing : 19.01.2022
Date of Pronouncement : 31.01.2022

आदेश/Order

PER SUDHANSHU SRIVASTAVA:

These two appeals are directed against the separate orders of the CIT(Appeal), National Faceless Appeal Centre, (NFAC) Delhi as per the following details:-

Sr. No.	ITA No. & party	A.Y.	Date or order
1	108 & 109/Jodh/2021 – Akbar Mohammand, Nagaur	2018-19 & 2019-20	29.09.2021

2. Since the issue involved is common in these appeals, which were heard together, therefore, these are being disposed off by this common order for the sake of convenience and brevity.

3. The brief facts of the case are that the assessee is a labour contractor. The return of income for assessment year 2018-19 was filed declaring income of Rs.

4,54,500/- . This return of income was processed by CPC, Bangalore and the income was assessed at Rs. 8,63,200/- by making an adjustment in respect of EPF/ESIC due, which were paid beyond the due date but before the filing of the return of income. The assessee filed rectification application u/s 154 of the Act against the intimation u/s 143(1) of the Act but the 154 application was rejected. Subsequently, the assessee filed an appeal before the NFAC against the rejection of the 154 application and the assessee's appeal was also rejected. Similarly, in assessment year 2019-20, the return of income was filed declaring income of Rs. 7,31,450/- which was processed by the CPC, Bangalore and the income was assessed at Rs. 8,44,938/- u/s 143(1) of the Act after making an adjustment of Rs. 1,13,490/- being EPF and ESI payments which were deposited beyond the prescribed date but before the filing of the return of income. In this year also, the application moved by the assessee u/s 154 of the Act was dismissed and subsequently the assessee's appeal against the rejection of 154 application was also dismissed by the Ld. First Appellate Authority.

3.1 Against the rejection of the above mentioned 154 applications, the assessee has now approached this Tribunal and has challenged the impugned action of the NFAC.

4.0 The Ld. counsel for the assessee submitted that the issue is squarely covered by the numerous decisions of the various Benches of the ITAT including the jurisdictional ITAT, Jodhpur Bench, Jodhpur. Following orders were furnished by the Ld. Counsel for the assessee, which are placed on record:-

a] The Hon'ble ITAT Jodhpur Bench in case of Mohangarh Engineers and Construction Company ITA No. 05/Jodh/2021, Pali Urban Cooperative Bank Ltd. ITA No.

28 & 29/Jodh/2021, U & T Tractor Spares Pvt. Ltd. ITA No. 43/Jodh/2021 dated 12/08/2021.

b) The Hon'ble ITAT Kolkata Bench in case of Harendra Nath Biswas v/s DCIT ITA No. 186/Kol/2021 dated 16/07/2021.

c) The Hon'ble ITAT Hyderabad Bench in case of Salzgitter Hydraulics Pvt. Ltd v/s ITO ITA No. 644/Hyd/2020 dated 15/06/2021.

5.0 In his rival submissions, the Ld. Sr. DR submitted that the assessee had not filed any appeal against the 143(1) intimation but had preferred rectification application u/s 154. It was submitted that no rectification of 143(1) intimation is possible and, therefore, the 154 application had rightly been rejected by the NFAC.

6.0 We have considered the submission of both the parties and perused the material available on record. In the present cases, it is not in dispute that the assessee deposited the contribution of PF & ESI belatedly in terms of section 36(1)(va) of the Act. However, the said deposits were made prior to filing of return of income u/s 139(1) of the Act.

6.1 Of course, it is a case in point that the assessee did not file any appeal against the intimations passed u/s 143(1) of the Act and the Ld. Sr. DR is right to the extent that the assessee cannot be given relief for that reason. However, it is also a settled law that the assessee cannot be taxed on an amount on which tax is not legally imposable. Although, the assessee might have chosen a wrong channel for redressal of his grievance, all the same, it is incumbent upon the Tax authorities to burden the assessee only with correct amount of tax and not to unjustly benefit at the cost of tax payer. Therefore, in the interest of substantial justice, we deem it expedient to restore

the issue to the file of the Assessing officer with a direction to pass appropriate orders deleting the addition / disallowance after duly considering the settled judicial position in this regard, which have been decided in the three cases as enumerated above in Para 5. For a ready reference, we also reproduce relevant observations of the various Benches as under:-

6.2 In the case of Harendra Nath Biswas vs DCIT Kolkata, ITA No. 186/Kol/2021 for the A.Y. 2019-20, similar issue has been decided vide order dated 16.7.2021 by the ITAT 'B' Bench, Kolkata. The Relevant findings have been given in para 4 of the said order, which read as under;-

“4. We have heard both the parties and perused the record. First of all we do not countenance this action of the Ld. CIT(A) for the simple reason that the Explanation 5 was inserted by the Finance Act, 2021, with effect from 01.04.2021 and relevant assessment year before us is AY 2019-20. Therefore the law laid down by the Jurisdictional Hon’ble High Court will apply and since this Explanation-5 has not been made retrospectively. So we are inclined to follow the same and we reproduce the order of Hon’ble Calcutta High Court in the case of Vijayshree Ltd. supra wherein the Hon’ble Calcutta High Court has taken note of the Hon’ble Supreme Court decision in CIT vs. Alom Extrusion Ltd. reported in 390 ITR 306. The Hon’ble Calcutta High Court’s decision in Vijayshree Ltd. supra is reproduced as under:

“This appeal is at the instance of the Revenue and is directed against an order dated 28th April, 2011 passed by the Income Tax Appellate Tribunal, “A” Bench, Kolkata in ITA No. 1091/Kol/2010 relating to assessment year 2006-07 by which the Tribunal dismissed the appeal preferred by the Revenue against the order of CIT(A).

The only issue involved in this appeal is as to whether the deletion of the addition by the AO on account of Employees ‘Contribution to ESI and PF by invoking the provision of Section 36(1)(va) read with Section 2(24)(x) of the Act was correct or not.

It appears that the Tribunal below, in view of the decision of the Supreme Court in the case of Commissioner of Income Tax vs. Alom Extrusion Ltd., reported in 2009 Vol.390 ITR 306, held that the deletion was justified.

Being dissatisfied, the Revenue has come up with the present appeal.

After hearing Mr. Sinha, learned advocate, appearing on behalf of the appellant and after going through the decision of the Supreme Court in the case of Commissioner of Income Tax vs. Alom Extrusion Ltd., we find that the Supreme Court in the aforesaid case has held that the amendment to the second proviso to the Sec 43(B) of the Income Tax Act, as introduced by Finance Act, 2003, was curative in nature and is required to be applied retrospectively with effect from 1st April, 1988.

Such being the position, the deletion of the amount paid by the Employees' Contribution beyond due date was deductible by invoking the aforesaid amended provisions of Section 43(B) of the Act.

We, therefore, find that no substantial question of law is involved in this appeal and consequently, we dismiss this appeal.

Urgent xerox certified copy of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities."

In the light of the aforesaid discussion we do not accept the Ld. CIT(A)'s stand denying the claim of assessee since assessee delayed the employees contribution of EPF & ESI fund and as per the binding decision of the Hon'ble High Court in Vijayshree Ltd. (supra) u/s 36(1)(va) of the Act since assessee had deposited the employees contribution before filing of Return of Income. Therefore, the assessee succeeds and we allow the appeal of the assessee."

6.3 Similar view has been taken by the ITAT Hyderabad 'SMC' Bench in ITA No. 644/Hyd./2020 for the AY 2019-20 in the case of Salzgitter Hydraulics Private Ltd, Hyderabad vs ITO vide order dt 15.6.2021. The relevant findings given in para 2 of the said order read as under:-

“2. Coming to the sole substantive issue of ESI/PF disallowance of Rs.1,09,343/- and Rs.3,52,622/-, the assessee’s and revenue’s stand is that the same has been paid before the due date of filing sec. 139(1) return and after the due date prescribed in the corresponding statutes; respectively. I notice in this factual backdrop that the legislature has not only incorporated necessary amendments in Sections 36(va) as well as 43B vide Finance Act, 2021 to this effect but also the CBDT has issued Memorandum of Explanation that the same applies w.e.f. 1.4.2021 only. It is further not an issue that the forergoing legislative amendments have proposed employers contributions; disallowances u/s 43B as against employee u/s 36 (va) of the Act; respectively. However, keeping in mind the fact that the same has been clarified to be applicable only with prospective effect from 1.4.2021, I hold that the impugned disallowance is not sustainable in view of all these latest developments even if the Revenue’s case is supported by the following case law.

- (i) CIT vs. Merchem Ltd, [2015] 378 ITR 443(Ker)*
- (ii) CIT vs. Gujarat State Road Transport Corporation (2014) 366 ITR 170 (Guj.)*
- (iii) CIT vs. South India Corporation Ltd. (2000) 242 ITR 114 (Ker)*
- (iv) CIT vs. GTN Textiles Ltd. (2004) 269 ITR 282 (Ker)*
- (v) CIT vs. Jairam & Sons [2004] 269 ITR 285 (Ker)*

The impugned ESI/PF disallowance is directed to be deleted therefore.”

6.4 On an identical issue, this Bench of the Tribunal vide order dated 12.8.2021 in the case of Mohangarh Engineers and Construction Company, Jodhpur & Others vs CPC, Banglore in ITA No. 5/Jodh/2021 and others held vide para 13 to 18 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 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 statutes 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'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. “*

6.5 A similar view has been taken by this Bench of the ITAT in ITA Nos. 65 & 66/Jodh/2021 in the case of Sawrup Ram Vs. ITO vide order dated 28.09.2021.

6.6 Therefore, we restore the issues to the file of the Assessing officer with a specific direction to allow the relief to the assessee by making suitable rectification in the computation of income by following the above mentioned judicial precedents.

7.0 In the final result, both the appeals are allowed for statistical purposes.

Order pronounced on 31.01.2022.

Sd/-
(N. K. SAINI)
Vice President
Dated : 31.01.2022
“आर.के.”

Sd/-
(SUDHANSHU SRIVASTAVA)
Judicial Member

आदेशकीप्रतिलिपिअग्रेषित/ Copy of the order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त/ CIT
4. आयकरआयुक्त (अपील)/ The CIT(A)
5. विभागीयप्रतिनिधि, आयकरअपीलीयआधिकरण, चण्डीगढ़/ DR, ITAT, Jodhpur
6. गार्डफाईल/ Guard File

आदेशानुसार/ By order

सहायकपंजीकार/ Assistant Registrar