

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

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER

ITA No.1157/Del/2021
Assessment Year: 2017-18

Stallion Security, A-40/41, Sector-3, Phase-III, Near DPS School, Dwarka, New Delhi	Vs.	DCIT, CPC, Bengaluru
PAN :ABMFS2870B		
(Appellant)		(Respondent)

Appellant by	Sh. Praveen Agarwal, CA Sh. Rahul Bansal, CA
Respondent by	Sh. Om Prakash, Sr.DR

Date of hearing	23.12.2021
Date of pronouncement	21.01.2022

ORDER

This is an appeal by the assessee against order dated 27.07.2021 of National Faceless Appeal Centre (NFAC) for the assessment year 2017-18.

2. The dispute in the present appeal is confined to disallowance of deduction claimed of Rs.9,77,173/- representing delayed payment of employees contribution to Provident Fund (PF) and Employees State Insurance (ESI).

3. Briefly the facts are, the assessee is a partnership firm. In the assessment year under dispute, assessee had filed its return

of income on 27.10.2017 declaring total income of Rs. 10,38,410/-. While processing the return of income filed by the assessee, the Centralised Processing Centre (CPC) disallowed employee's contribution to PF and ESI, since, such payments were not made within the due date provided under the relevant Acts and Rules governing such payment. Against the disallowance so made amounting to Rs. 9,77,173/-, assessee preferred an appeal before learned Commissioner (Appeals). However, referring to the amendment made to section 36(1)(va) by Finance Act 2021 w.e.f. 1.4.2021 and the corresponding amendment made to section 43B by inserting Explanation 5, learned Commissioner (Appeals) held that as a result of such amendment, the assessee would not be eligible to claim deduction of employee's contribution to PF and ESI, if, such amount is not paid within the due date prescribed under the relevant Act and Rule. While doing so, he also referred to the explanatory note to the amendment made and held that such amendment would apply retrospectively as it is clarificatory in nature and only explains the meaning of due date as provided under the relevant statutory provisions. Thus, he upheld the disallowance.

4. Learned Counsel appearing for the assessee submitted, the amendment to section 36(1)(va) and section 43B made by the Finance Act 2021 being effective from 1.4.2021, would apply prospectively from assessment year 2021-22 and subsequent assessment years. Hence, these amendments would not be applicable to the impugned assessment year. Thus, as per the statutory provision applicable to the year under dispute and prevailing legal principle, the deduction is allowable. In support of such contention, learned Counsel relied upon the decision of Coordinate Bench in case of Mr. Vansh Jain vs DCIT ITA No. 1853/Del/2020, dated 13.10.2021.

5. Though, learned Departmental Representative agreed that the issue is covered by the decision cited by learned Authorised Representative, however, he relied upon the observations of the learned Commissioner (Appeals).

6. I have considered rival submissions and perused the material on record. As per the settled legal principle, delayed payment of contribution to PF and ESI including employee's contribution, is allowable as deduction under section 43B r.w.s 36(1)(va) of the Act if it is paid before the due date of return of income prescribed under section 139(1) of the Act. Undisputedly,

in the facts of the present appeal, the employees' contribution to PF and ESI were paid before the due date of return of income prescribed under section 139(1) of the Act. However, assessee's claim has been disallowed by applying the amended provisions of section 36(1)(va) and 43B of the Act. Though, the amendment to the aforesaid provisions restricting the applicability of section 43B to employee's contribution to PF and ESI as well as explaining the due date of payment of the aforesaid dues have been brought into the statute by Finance Act, 2021 w.e.f. 1.4.2021, however, learned Commissioner (Appeals) has applied them to the impugned assessment year by stating that the amendments will have retrospective operation as they are clarificatory in nature. However, as I find, this issue is squarely covered in favour of the assessee by the decision of the Coordinate Bench in the case of Mr. Vansh Jain Vs. DCIT (supra). While considering identical disallowance made by applying the amended provisions of section 36(1)(va) and section 43B, the coordinate bench has held that the amended provisions would apply prospectively w.e.f. assessment year 2021-2022. The observation of the learned Bench in this regard is reproduced hereunder for better clarity:-

“7. I have considered the rival arguments made by both the sides, perused the orders of the A.O. and the Ld. CIT(A) and the paper book filed on behalf of the assessee. I have also considered the various decisions cited before me. I find the A.O. CPC in the instant case has computed the income of the assessee at Rs.23,44,250/- as against the returned income of Rs.20,17,920/- by making an adjustment for a sum of Rs.3,26,330/- on account of belated payment to employees' contribution towards PF & ESI by invoking the provisions of Section 143(i)(a)(iv) of the I.T. Act, 1961. I find the rectification application filed by the assessee under section 154 was dismissed by the DCIT, CPC and on further appeal, the Ld. CIT(A) dismissed the appeal filed by the assessee. It is the submission of the Learned Counsel for the Assessee that payment for employees' contribution towards PF & ESI have been made before the due date of filing of the income tax return under section 139(1), therefore, in view of the consistent decisions ITA.No.1853/DeL/2020 Mr. Vansh Jain, New Delhi of the Coordinate Benches of the Tribunal, the same does not call for any disallowance. It is also his submission that after the decision of the Hon'ble Delhi High Court in the case of CIT vs., M/s. Bharat Hotels Ltd., (supra), the Hon'ble Delhi High Court in the case of PCIT vs., Pro Interactive Service (India) Pvt. Ltd., vide ITA.No.983/2018 order dated 10.09.2018 has held that no disallowance is called for where the assessee had paid the employees' contribution to PF & ESI before the due date of furnishing of return of income under section 139(1) of the I.T. Act, 1961.

7.1.1 I find the Hon'ble Delhi High Court in the case of Pro Interaction Service (India) Pvt. Ltd., (supra), following the decision in the case of CIT vs., 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.

7.2. I find the Coordinate Bench of the Tribunal in the case of *Insta Exhibitions Pvt. Ltd., New Delhi vs., Addl. CIT, Special Range-4, New Delhi vide ITA.No.6941/Del./2017 order dated 03.08.2021 while allowing such belated deposit of employees' contribution to PF & ESI as per the respective Act, but, paid before the due date of filing of the income tax return, deleted such disallowance by observing as under:*

"8. We have carefully considered contentions of the learned departmental representative and perused the orders of the lower authorities. The facts shows that the assessee has collected the sum of Rs. 12,16,260/- being employee's contribution under the provident fund and with respect to ESI laws. The above contribution was admittedly not deposited by the assessee within the due date prescribed under the respective ESI and PF statute however, same was deposited before the due date of filing of return of income. Therefore, the Id AO as well as the Id CIT(A) disallowed the same holding that such contribution becomes the income of the assessee under the provision of section 2(24)(x) of the Act and thereafter if the same is deposit within the due date prescribed under the respective laws then same is allowable as deduction u/s 36(i)(va) of the Act. Coordinate bench in case of DCIT Vs Dee Development Engineers in ITA No. 4959/DEL/2016 (A.Y 2011-12) has held as Under:-

"7. We have heard both the parties and perused all the relevant material available on record. As regards Ground No. 1, the assessee company has not deposited the employees' contribution within the due date which is prescribed under the said statute i.e. Provident Fund and ESIC. This issue is dealt by the Hon'ble Delhi High Court in case of CIT vs. M/s Bharat Hotels Ltd. 410 ITR 417 wherein the issue is decided in favour of the revenue, without considering the decision of the Hon'ble Delhi High Court in case of CIT vs. AIMIL Ltd.(20io) 321ITR 508 (Del.). But the Ld. AR relied upon the decision of the Hon'ble Delhi

High Court in case of Pr. CIT vs. Pro Interactive Service (India) Pvt. Ltd. ITA No. 983/2018 pronounced on 10.09.2018 wherein the Hon'ble High Court decided the issue in favour of the assessee relying upon the judgment of AIMIL Ltd. (supra). The Hon'ble Delhi High Court held that the legislative intent was/is to ensure that the amount paid is allowed as 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 (EPF) and Employee's State Insurance Scheme (ESI) as deemed income of the employer under Section 2(24)(x) of the Act. 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. Hence, in light of the latest decision in case of Pro Interactive Service (India) Pvt. Ltd., the issue is covered in favour of the assessee. Hence, Ground No. 1 is dismissed."

7. Further with respect to the argument of the learned departmental representative that amendment made with finance act 2021 wherein explanation 1 is added u/s 36 (1) (va) of the act with effect from 1 April 2021, is applicable to the present case, we referred to the "Notes on clauses" at the time of introduction of the finance bill 2021 which says as Under:-

"Clause 8 of the Bill seeks to amend section 36 of the Income tax Act, relating to other deductions. Sub-section (1) of the said section provides for allowing of deductions provided for in the clauses thereof for computing the income referred to in section 28 of the said Act. Clause (va) of the said sub-section provides for allowance of deduction for 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 to the said clause provides that 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. It is proposed to insert Explanation 2 to clause (va) of sub-section (1) of the said section so as to clarify 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 the said clause.

This amendment will take effect from 1st April, 2021 and will, accordingly, apply in relation to the assessment year 2021- 2022 and subsequent assessment years."

Therefore it is apparent that the above amendment do not apply to the assessment year 2014-15 in this appeal.

8. *In view of this we allow the solitary ground of appeal raised by the assessee holding that the addition/disallowance made by the learned assessing officer of late deposit of employees contribution to the provident fund and ESI, as it is deposited before the due date of the filing of the return of an income but beyond the due date prescribed Under the respective provident fund and ESI laws is not sustainable in law."*

7. No contrary decision has been brought to my notice by learned Departmental Representative. Therefore, respectfully following the decision of the Coordinate Bench as referred to above, I hold that assessee's claim of deduction of an amount of

Rs. 9,77,173/- has to be allowed. Accordingly, I delete the disallowance.

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

Order pronounced in the open court on 21.01.2022

**Sd/-
(SAKTIJIT DEY)
JUDICIAL MEMBER**

Dated: 21.01.2022

RK/-

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi