

आयकर अपीलीय अधिकरण, विशाखापटणम पीठ, विशाखापटणम

**IN THE INCOME TAX APPELLATE TRIBUNAL,
VISAKHAPATNAM BENCH, VISAKHAPATNAM
(through web-based video conferencing platform)**

श्री दुव्वूरु आर एल रेड्डी, न्यायिक सदस्य एवं श्री एस बालाकृष्णन, लेखा सदस्य के समक्ष

**BEFORE SHRI DUVVURU RL REDDY, HON'BLE JUDICIAL MEMBER &
SHRI S BALAKRISHNAN, HON'BLE ACCOUNTANT MEMBER**

**आयकर अपील सं./I.T.A.No. 203/Viz/2021
(निर्धारण वर्ष/Assessment Year : 2019-20)**

Sandhya Aqua Exports Pvt. Ltd.MIG-
25 A, Lawsons Bay Colony
Visakhapatnam

Vs. Dy.Commissioner /
Asst.Commissioner of
Income Tax, Circle-4(1)
Visakhapatnam

[PAN : AAJCS2286C]

(अपीलार्थी/ Appellant)

(प्रत्यर्थी/ Respondent)

अपीलार्थी की ओर से/ Appellant by
प्रत्यर्थी की ओर से / Respondent by

: None
: Shri SPG Mudaliar, DR

सुनवाई की तारीख / Date of Hearing

: 03.02.2022

घोषणा की तारीख/Date of Pronouncement

: 16.02.2022

आदेश /ORDER

Per Shri Duvvuru RL Reddy, Judicial Member :

This appeal is filed by the assessee against the order of the Commissioner of Income Tax (Appeals) [CIT(A)], National Faceless Appeal Centre (NFAC), Delhi dated 15.09.2021 for the Assessment Year (A.Y.) 2019-20.

2. The only grievance of the assessee is that the Ld.CIT(A) confirmed the disallowance of Employees Contribution to Provident Fund and Employees State Insurance, on the ground that the assessee made the payments belatedly as per the respective Acts. Brief facts of the case are that the assessee is a Private Limited Company filed its return of income for the A.Y.2019-20 disclosing income of Rs.31,72,37,170/-. As per the intimation u/s 143(1) of the Income Tax Act, 1961 (in short 'Act'), passed by the ADIT, Centralized Processing Center (CPC), Bangalore dated 01.05.2020 made disallowance of expenses in relation to employees contribution to PF and ESI to the tune of Rs.7,56,158/- and raised the demand accordingly.

3. On being aggrieved, the assessee preferred an appeal before the Ld.CIT(A). After considering the grounds raised by the assessee, the Ld.CIT(A) confirmed the disallowance made by the Assessing Officer(AO).

4. On being aggrieved, the assessee preferred an appeal before us and raised the following grounds :

1. The order of the commissioner of Income Tax (Appeals) is contrary to the law and facts of the case. The commissioner of income Tax (Appeals), NFAC, Delhi is not justified in confirming the disallowance made by the Assessing Authority in respect of delay in payment of Employee Provident Fund and Employee State Insurance to the tune of Rs.7,56,158/- as the appellant remitted the said amounts of Rs.7,00,322/- and Rs.55,836/- respectively before the due date for filing of return of income, it is not justified on the part of the

Assessing Officer and confirming of the said addition/disallowance by the Commissioner of Income Tax (Appeals) is unwarranted. Hence the appellant prays the Honourable Income Tax Appellate Tribunal, Visakhapatnam to consider the submission of the appellant in this regard by granting relief.

2. As number of various other High Courts and Honourable Tribunals have considered this issue in various appeals filed by the respective assesseees and allowed the appeals by granting the relief and allowing the appeals, the appellant prays the Honourable Tribunal to allow the appeal by setting aside the order of the Learned Commissioner of Income Tax (Appeals). As long as there is no jurisdictional High Court judgement against the appellant's ground/case, and various judgements pronounced by various High Courts and Tribunals in favour of the appellant, they have to be considered in favour of the appellant. This view of the appellant is fully supported by the decision of the Honourable Supreme Court. Hence, the appellant prays for relief.

3. For these and other grounds that may be urged at the time of appeal hearing, the appellant prays for relief.

5. The only grievance of the assessee is that the lower authorities made disallowance of Rs.7,56,158/- on account of late deposit of ESI and EPF contribution from the employees. The assessee made the payment before filing of the due date of filing of return of income u/s 139(1) of the Income Tax Act, 1961 (in short 'Act') and also relied on the decisions of various High Courts and Hon'ble Tribunals, wherein, it was held that if the payments were made before filing of the due date of filing of return of income u/s 139(1), the assessee is entitled to claim the deduction.

6. The Ld.DR submitted that the lower authorities have rightly disallowed the payments made belatedly as per the respective Acts. He further submitted that the Employees Contribution to PF is allowed as

deduction, if the same is deposited on or before the due date specified under the provisions of Provident Fund Act. He further submitted that since the assessee has not deposited the contribution to respective fund account on the date as prescribed in Explanation to section 36(1)(va) of the Act, the disallowance made by the AO was just, proper and reasonable, therefore, submitted that the Ld.CIT(A) rightly confirmed the disallowance made by the AO, hence the addition is to be sustained. The Ld.DR relied on the decision of Hon'ble Kerala High Court in the case of CIT Vs. Merchem Ltd. reported in (2015) 378 ITR 443 and Hon'ble Gujarat High Court in the case of CIT Vs. Gujarat State Road Transport Corporation (366 ITR 170) [2014] (Gujarat) reported in (2014) 366 ITR 170 41 taxmann.com 100.

7. We have heard Ld.DR and perused the material placed on record. After considering the facts and circumstance of the case, we are of the view that it is undisputed fact that the payments were made beyond due date of specified time mentioned in the Provident Fund Act. It is also admitted fact that the payments were made by the assessee before filing of the due date of filing the return of income. On this aspect, the coordinate Bench of ITAT, Visakhapatnam on similar set of facts decided the issue in favour of the assessee, relying on the decision of Hon'ble Karnataka High Court in the

case of *Essae Teraoka (P) Ltd. Vs. DCIT (supra)*, wherein, the Hon'ble Karnataka High Court viewed as follows :

"8. The Hon'ble Karnataka High Court, in the case of Essae Teraoka (P) Ltd. Vs. DCIT 366 ITR 408 took the view that the word contribution occurring in section 43B of the Act would include employees' contribution to PF in the light of the definition of the word contribution as per the provisions of section 2(c) of the PF Act. As per the said section, contribution would mean both employer's contribution and employees' contribution. Accordingly, it was held that the provisions of section 43B of the Act allowing deduction for payment made before the due date of filing of Income Tax return cannot be ignored. Similarly, the ITAT, Hyderabad Tribunal in the case of Tetra Soft (India) Pvt. Ltd. Vs. ACIT (2015) 40 ITR (Trib) 470 held that when assessee remitted employees' contribution to PF within due date of filing return of income u/s 139(1) of the Act, amount of employees' contribution to PF cannot be disallowed. Similar view was upheld by the Chennai bench of the ITAT, in the case of ACIT Vs. Farida Shoes Pvt. Ltd. (2016) 46 CCH 29. The coordinate bench held that if assessee had not deposited employees' contribution towards provident fund up to the due date as prescribed under relevant statute, but before due date of filing of return no disallowance could be made in view of the provisions of section 43B of the Act. In the case of CIT Vs. Udaipur Dugdh Utpadak Sahakari Sangh Ltd. 35 Taxman 616, the Hon'ble High Court of Rajasthan, after referring to the apex court decision in the case of CIT Vs. Alom Extrusions Ltd. 319 ITR 306 & CIT Vs. Vinay Cement Ltd. held that the deductions should be allowed for the payment of employees' contribution made before the due date of filing of return. Similarly, in the case of CIT Vs. State Bank of Bikaner, the Hon'ble Rajasthan High Court held that contribution paid after the due date under the respective Act, but before filing the return of income u/s 139(1) of the Act cannot be disallowed u/s 43B of the Act and or u/s 36(1)(va) of the Act. "

Coordinate Bench of ITAT, Visakhapatnam considered the decision of Hon'ble Kerala High Court and Hon'ble High Court of Gujarat relied by the Ld.DR and to overcome the situation, the Coordinate Bench has taken support from the decision of Hon'ble Supreme Court in the case of *CIT Vs. M/s Vegetables Products Ltd.* reported in 88 ITR 192, wherein it was held that if two reasonable constructions of a taxing provision are possible that

construction which favours the assessee must be adopted. After considering all these decisions, the coordinate Bench of this Tribunal has allowed the appeal of the assessee in the case of Focus Trans Tech Shipping Private Ltd., Vs DCIT, Visakhapatnam in I.T.A. No.132/Viz/2021 dated 23.09.2021. For the sake of clarity and convenience, relevant part of the order of the Tribunal is extracted as under :

“5. On merits also, this Tribunal has consistently viewed that the employees contribution to PF and ESI is allowable deduction if the same is paid before the due date of filing the return of income. In the case of APEPDCL in I.T.A.No.609/V/2014 dated 29.07.2016, the coordinate bench of ITAT, Visakhapatnam after considering the decision of Hon’ble Karnataka High Court in the case of Essae Teraoka (P) Ltd. Vs. DCIT 366 ITR 408 and the decision of coordinate bench of ITAT Hyderabad in the case of Tetra Soft (India) Pvt. Ltd. Vs. ACIT (2015) 40 ITR (Trib) 470 and also taking support from the decision of Hon’ble Supreme Court in the case of CIT Vs. M/s Vegetables Products Ltd., 88 ITR 192, decided the issue in favour of the assessee. For the sake of clarity and convenience, we extract para No.5 to 10 which reads as under:

“5. We have heard both the parties, perused the materials available on record and gone through the orders of the authorities below. The A.O. made additions towards belated payment of employees’ contributions to PF. According to the A.O., employees’ contribution to provident fund is deductible under the provisions of section 36(1)(va) of the Act, if the same is paid on or before the due date specified under the provident fund Act. The A.O. further was of the opinion that in view of the clear provisions of section 2(24)(x) r.w.s. 36(1)(va) of the Act, any recovery from employees towards provident fund contribution is deemed to be income of the assessee, if the employer not paid the same to the provident fund account of the employee within due date specified under the provisions of PF Act. It is the contention of the assessee that second proviso to section 43B of the Act provides that no deduction shall be allowed unless such sum is actually been paid on or before due date as specified in explanation to 36(1)(va) of the Act which was omitted by the Finance Act, 2003 w.e.f. 1.4.2004 and accordingly, there was no special provision regarding employees’ contribution to PF. It is further contended that as per the amended provisions of section 43B of the Act, any sum payable by the assessee as an employer by way of contribution to PF shall be allowed, if the same is paid on or before the due date of filing of return of income u/s 139(1) of the Act.

6. The only issue to be resolved is whether the assessee would be entitled to claim deduction for the employees' contribution made to PF after the due date prescribed under the PF Act, but before the due date prescribed for filing of income tax return in the light of the provisions contained in section 36(1)(va) of the Act and section 43B(b) of the Act. It is the contention of the assessee that there is no distinction between employer and employee contribution after omission of second proviso of section 43B of the Act by Finance Act, 2003 w.e.f. 1.4.2004. We find force in the arguments of the assessee for the reason that there is no difference between employees and employer contribution under the PF Act. Section 6 of Provident Fund Act provides for contribution and the manner in which such contribution shall be made. Paragraph 30 of the PF Scheme provides for payment of contributions. As per the said scheme, the employer at the first instance shall make the total contribution including employees' share. Paragraph 32 provides for recovery of member share of contribution and as per the scheme, the employer can recover the employees' share from the wages paid to the employee. Therefore, as per the PF Act and scheme of contributions, the contributions means and include both employees' and employer's share. Similarly, section 2(c) of the Provident Fund Act defines the contribution to mean a contribution payable in respect of a member under the scheme or the contribution payable in respect of an employee to whom the scheme applies. There is a prescribed mode of payment of contributions under the PF Act. Under the said Act, the employer shall contribute both employees and employer share along with administrative charges before the due date specified under the PF Act. The Act prescribed only one due date for depositing the contribution i.e. 15th of subsequent month with the grace period of 5 days which indicates that there is no difference between employee and employer contribution. If the legislature intends to differentiate employees and employer contribution, then there would have been two due dates like in the case of Income Tax Act. Therefore, from the above, it is clear that the Provident Fund Act does not differentiate employees and employer contribution and contribution means both employees and employer contribution under the PF scheme.

7. Section 43B of the Act provides for certain deductions to be allowed only on actual payment basis. Sub clause (b) of section 43B of the Act covers any sum payable by the assessee as an employer by way of contribution to any Provident fund or superannuation fund or gratuity fund or any other fund for the welfare of the employees. The proviso to section provides that any sum paid by the assessee on or before the due date of furnishing return of income u/s 139(1) of the Act, then no disallowance can be made under the provisions of section 43B of the Act. A careful consideration of section 43B of the Act, it is clear that an extension is granted to the assessee to make the payment of PF contributions or any other fund till the due date of furnishing return of income u/s 139(1) of the Act. Therefore, in our opinion, there is no

difference between employees and employer contribution to PF and if such contribution is made on or before the due date of furnishing return of income u/s 139(1) of the Act, then deduction is to be allowed under the provisions of section 43B of the Act.

8. The Hon'ble Karnataka High Court, in the case of Essae Teraoka (P) Ltd. Vs. DCIT 366 ITR 408 took the view that the word contribution occurring in section 43B of the Act would include employees' contribution to PF in the light of the definition of the word contribution as per the provisions of section 2(c) of the PF Act. As per the said section, contribution would mean both employer's contribution and employees' contribution. Accordingly, it was held that the provisions of section 43B of the Act allowing deduction for payment made before the due date of filing of Income Tax return cannot be ignored. Similarly, the ITAT, Hyderabad Tribunal in the case of Tetra Soft (India) Pvt. Ltd. Vs. ACIT (2015) 40 ITR (Trib) 470 held that when assessee remitted employees' contribution to PF within due date of filing return of income u/s 139(1) of the Act, amount of employees' contribution to PF cannot be disallowed. Similar view was upheld by the Chennai bench of the ITAT, in the case of ACIT Vs. Farida Shoes Pvt. Ltd. (2016) 46 CCH 29. The coordinate bench held that if assessee had not deposited employees' contribution towards provident fund up to the due date as prescribed under relevant statute, but before due date of filing of return no disallowance could be made in view of the provisions of section 43B of the Act. In the case of CIT Vs. Udaipur Dugdh Utpadak Sahakari Sangh Ltd. 35 Taxman 616, the Hon'ble High Court of Rajasthan, after referring to the apex court decision in the case of CIT Vs. Alom Extrusions Ltd. 319 ITR 306 & CIT Vs. Vinay Cement Ltd. held that the deductions should be allowed for the payment of employees' contribution made before the due date of filing of return. Similarly, in the case of CIT Vs. State Bank of Bikaner, the Hon'ble Rajasthan High Court held that contribution paid after the due date under the respective Act, but before filing the return of income u/s 139(1) of the Act cannot be disallowed u/s 43B of the Act and or u/s 36(1)(va) of the Act.

9. The Ld. D.R. relied upon the decision of Hon'ble High Court of Kerala, in the case of CIT vs. Merchem Ltd, reported in (2015) 378 ITR 443 and submitted that employees' contribution to provident fund is allowed as deduction, if the same is deposited on or before the due date specified under the provisions of provident fund Act. The D.R. also relied upon the decision of Gujarat High Court, reported in (2014) 366 ITR 170, wherein the Hon'ble Gujarat High Court held that since assessee had not deposited said contribution to respective fund account on the date as prescribed in explanation to section 36(1)(va) of the Act, disallowance made by the A.O. was just and proper. Though, the D.R. relied upon certain judicial precedents which are in favour of the revenue, in view of the decision of Hon'ble Supreme Court, in the case of CIT Vs. M/s. Vegetables Products Ltd. reported in 88 ITR 192, wherein the Hon'ble Supreme Court held that if two

reasonable constructions of a taxing provision are possible that construction which favours the assessee must be adopted, therefore, by respectfully following the decision of Supreme Court, when divergent views are expressed by different judicial forums, we prefer to follow the views expressed by the Courts which are in favour of the assessee.

10. Considering the facts and circumstances of this case and also following the judicial precedents as discussed above, we are of the view that there is no distinction between employees' and employer contribution to PF, and if the total contribution is deposited on or before the due date of furnishing return of income u/s 139(1) of the Act, then no disallowance can be made towards employees' contribution to provident fund. The CIT(A) after considering the relevant details rightly deleted the additions made by the A.O. We do not see any reasons to interfere with the order of the CIT(A). Hence, we inclined to uphold the CIT(A) order and dismiss the appeal filed by the revenue."

Therefore, respectfully following the view taken by the Tribunal in the above cases, we hold that on merits also, the assessee succeeds in appeal. Accordingly, appeal of the assessee is allowed."

Therefore, respectfully following the view taken by the Tribunal in the above cases, we hold that the orders passed by the AO as well as the Ld.CIT(A) are erroneous. Hence, the disallowance on account of late deposit of employees contribution to PF / ESI is hereby deleted. Accordingly appeal of the assessee is allowed.

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

Order pronounced in the open court on 16th February, 2022.

<p>Sd/- (एस बालाकृष्णन) (S.BALAKRISHNAN) लेखा सदस्य/ACCOUNTANT MEMBER Dated : 16.02.2022 <i>L.Rama, SPS</i></p>	<p>Sd/- (दुव्वूरु आर.एल रेड्डी) (DUVVURU RL REDDY) न्यायिक सदस्य/ JUDICIAL MEMBER</p>
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आदेश की प्रतिलिपि अग्रेषित/Copy of the order forwarded to:-

1. निर्धारिती/ The Assessee – Sandhya Aqua Exports Pvt. Ltd.MIG-25 A, Lawsons Bay Colony, Visakhapatnam
2. राजस्व/The Revenue – Dy.Commissioner / Asst.Commissioner of Income Tax, Circle-4(1), Visakhapatnam
3. आयकर आयुक्त (अपील)/CIT(A), National Faceless Appeal Centre, Delhi
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, विशाखापटणम/DR, ITAT, Visakhapatnam
- 5.गार्डफ़ाईल / Guard file

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आदेशानुसार / BY ORDER

Sr. Private Secretary
 ITAT, Visakhapatnam