

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI “SMC” BENCH: NEW DELHI**

(THROUGH VIDEO CONFERENCING)

BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER

ITA No.1571/Del/2021

[Assessment Year : 2019-20]

Computer Clinic India Pvt.Ltd., 301-A, Sagar Complex, New Rajdhani Enclave, Vikas Marg, New Delhi-110092. PAN-AAACC5384N	vs	ITO, Ward-6(2), New Delhi.
APPELLANT		RESPONDENT
Appellant by	Shri Rahul Kant, AR	
Respondent by	Shri Sanjay Kumar, Sr.DR	
Date of Hearing	22.02.2022	
Date of Pronouncement	22.02.2022	

ORDER

PER KUL BHARAT, JM :

This appeal filed by the assessee for the assessment year 2019-20 is directed against the order of Ld. CIT(A), National Faceless Appeal Centre (“NFAC”) dated 01.09.2021.

2. The assessee has raised following grounds of appeal:-

1. *“That the appellant denies its liability to be assessed at total income of Rs.13,68,780/- as against returned income of Rs. 3,11,463/- under section 115JB of the Income-tax Act, 1961 and accordingly denies its liability to pay tax, cess and interest demand thereon.*

2. *That having regard to the facts and circumstances of the case, the Ld. Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi has erred in law and on facts in confirming the action of Ld. Assessing Officer in making adjustments under section 143(1)(a) of the Income-tax Act, 1961 by disallowing the sum of, Rs. 12,38,435/- on account of delayed payment of Employees' Contribution to PF/ ESI by invoking the provision of Section 2(24)(x) r.w.s. 36(1)(va), even though the payments have been made before the due date specified under section 139(1) and as such are fully allowable.*
3. *That the Ld. CIT(A), NFAC has erred in disregarding the decision of Hon'ble Jurisdictional High Court, Delhi as well as the decisions of various Jurisdictional Income Tax Appellate Tribunal, Delhi, holding that such disallowance cannot be made when the amount is credited in the relevant account before due date of filing of return of income.*
4. *That the appellate order dated 01.09.2021 passed by the Ld. CIT(A), NFAC is bad in law.”*

3. Facts giving rise to the present appeal are that the assessee filed its return of income declaring income of Rs.1,30,340/- on 24.10.2019. The ADIT (CPC), Bangalore assessed the total income of the assessee at Rs.13,68,780/- and made addition of Rs.12,38,435/- on account of disallowance u/s 36(1)(va) of the

Income Tax Act, 1961 (“the Act”) in respect of employee’s contribution to Provident Fund and ESIC which was deposited beyond due date under the relevant law.

4. Aggrieved against this, the assessee preferred appeal before Ld.CIT(A), who confirmed the addition.

5. Now, the assessee is in appeal before this Tribunal.

6. Ld. Sr. DR vehemently submitted that law is clear in this respect and he relied upon the decision of Ld.CIT(A). He further relied upon the decision of Hon’ble Delhi High Court in the case of *CIT vs Bharat Hotels Ltd. [2019] 103 Taxmann.com 295 (Delhi)* wherein the Hon’ble High Court has decided the issue in favour of the Revenue by observing as under:-

8. “Having regard to the specific provisions of the Employees’ Provident Funds Act and ESI Act as well as the concerned notifications which granted a grace period of 5 days (which appears to have been late withdrawn recently on 08.01.2016), we are of the opinion that the ITAT’s decision in this case was not correct. The assessee undoubtedly was entitled to claim the benefit and properly treat such amounts as having been duly deposited, which were in fact deposited within the period prescribed (i.e. 15 + 5 days in the case of EPF and 21 days + any other grace period in terms of the extent

notification). As far as the amounts constituting deductions from employees' salaries towards their contributions, which were made beyond such stipulated period, obviously the assessee was not entitled to claim the deduction from its returns."

7. I have heard the rival contentions and perused the material available on record and gone through the orders of the authorities below. Ld.CIT(A) has decided the issue by observing as under:-

5.0. "I have carefully considered the facts of the case and the rival contentions. There are conflicting decisions of the various courts including High Courts and ITATs on the issue. The Case Laws relied upon by the appellant and the arguments of the appellant are considered. Whereas some of the decision are in favour of the appellant whereas there are some decisions which are in favour of Revenue as well. The Hon'ble Gujarat High Court, in the case of CIT vs. Gujarat State Road Transport Corporation has held as under:

"S. 43B which permits a deduction for payments made upto the due date for filing the ROI applies only to the employer's contribution to the provident fund etc. It does not apply to the employees' contribution. The employees' contribution received by the employer-assessee is deemed to be income in the assessee's hands u/s. 2(24)(X) and if the assessee has not credited the said sum to the employees' account in the relevant fund or funds on or before the due date mentioned in Explanation to

s. 36(1)(va), the assessee shall not be entitled to deductions of such amount in computing the income referred to in s. 28 of the Act. The argument that two views are possible is not acceptable because only one view is possible on a correct interpretation of the provision (Alom Extrusion 319 ITR 350 (SC) distinguished, Aimil Ltd 321 ITR 508 (Del), Nipso Polyfabriks 350 ITR 327 (HP), Spectrum Consultants 34 taxmann.com 20 (Kar); Udaipur Dugdh Utpadak Sahakari Sandh 35 taxmann.com 616 (Raj) & Hemla Embroidery Mills (P&H) dissented"

Similarly in the case of ITO vs. LKP Securities Ltd. Hon'ble ITAT Mumbai held as under:

"S. 43B covers only the sums payable by way of contribution by the assessee as an employer, i.e., the employer's contribution to the PF and ESI funds. It does not cover the employees' contribution. While the employer's contribution is allowable u/s 37(1), the employees' contribution collected by the employer is deemed to be his income u/s 2(24)(x) and is allowable as a deduction u/s 36(1)(va) only if it is paid to the relevant fund by the due date as prescribed in the relevant legislation. Even if one assumes that s. 43B(b) applies to s. 36(1)(va) payments, a deduction would not be admissible because the s. 36(1)(va) payments are not 'otherwise allowable' if they are paid beyond the 'due date'. The decisions in Vinay Cement 213 CTR (SC) 268 & Alom Extrusions 319 ITR 306 (SC) are not an authority on the point that employees'

contributions are also covered by s. 43B. Though in AIMIL 321 ITR 508 (Del) it was held that employees' contribution to EPF and ESI funds are covered by s. 43B, it cannot be followed because (i) the Court moved on the premise that employees' contribution is subject to clause (b) of s. 43B and did not notice the condition in s. 36(1)(va), (ii) the decision by the tribunal, which was approved by the High Court in AIMIL was rendered without considering the decision of the Special Bench in ITC Ltd & (iii) it is inconsistent with Godaverri (Mannar) Sahakari 298 ITR 149 (Bom). Accordingly, AIMIL cannot be followed and the deductibility of employees' contribution has to be seen only with reference to s. 36(1)(va) (together with grace period) (Bengal Chemicals & Pharmaceuticals (included in file) & ITC Ltd 112 ITD 57 (Kol)(SB) followed)"

The issue of allowability of Employees Contribution to P. F. (or any other welfare fund) has also been taken up in the Finance Bill, 2021. The Memorandum explaining the provisions of Finance Bill, 2021 states as under:

"Section 43B specifies the list of deductions that are admissible under the Act only upon their actual payment. Employer's contribution is covered in clause (b) of section 43B. According to it, if any sum towards employer's contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of the employees is actually paid by the assessee on or before the due date for furnishing the return of the income under

sub-section (1) of section 139, assessee would be entitled to deduction under section 43B and such deduction would be admissible for the accounting year. This provision does not cover employee contribution referred to in clause (va) of sub-section (1) of section 36 of the Act.

Though section 43B of the Act covers only employer's contribution and does not cover employee contribution, some courts have applied the provision of section 43B on employee contribution as well. There is a distinction between employer's contribution and employee's contribution towards welfare fund. It may be noted that employee's contribution towards welfare funds is a mechanism to ensure the compliance by the employers of the labour welfare laws. Hence, it needs to be stressed that the employer's contribution towards welfare funds such as ESI and PF needs to be clearly distinguished from the employee's contribution towards welfare funds. Employee's contribution is employee's own money and the employer deposits this contribution on behalf of the employee in fiduciary capacity. By late deposit of employee contribution, the employers get unjustly enriched by keeping the money belonging to the employees. Clause (va) of sub-section (1) of Section 36 of the Act was inserted to the Act vide Finance Act 1987 as a measures of penalizing employers who mis-utilize employee's contributions."

The memorandum explaining the provisions above is only to emphasise the intent of the Legislature in passing the original law in respect of the issue as well on the Amendment to Section 43B(b) by Finance Act, 2003. The scope of Section 43B and Section 36(1)(va) are different and thus, there is no question of reading both provisions together to consider as to whether the taxpayer is entitled to deduction in respect of the sum belatedly paid towards such contribution, especially when such sum is, admittedly, a sum received by the taxpayer / employer from his employee. Therefore, for considering such question, application of Section 36(1)(va) read with section 2(24)(x) alone is the proper course and any other interpretation would only defeat the object and scope of both the provisions viz., 43B and 36(1)(va). If the payment was not done within the stipulated time prescribed under the relevant enactment, the benefit of deduction cannot be claimed, since such belated payment is not a valid payment to attract deduction, under the purview of the Income Tax Act.

Finance Act, 2021 has made the following amendment on the issue of Employees' Contribution of Provident Fund, ESI or any other welfare fund:

In section 36 of the Income-tax Act, in sub-section (1), in clause (va), the Explanation shall be numbered as Explanation 1 thereof and after Explanation 1 as so numbered, the following Explanation shall be inserted, namely:-

'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;'

In section 43B of the Income-tax Act, after Explanation 4, the following Explanation shall be inserted, namely:-

"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."

It can be noticed that there is a distinction between employer contribution and employee's contribution towards welfare fund. Based on the above amendment in Section 36 and 43B, a clear message is given by the Legislature that statute does not wish to allow employers to use the money deducted from the salary of employees. Accordingly, amount of employee's contribution must get deposited within the dates specified under the respective Act to remain eligible for the deductions u/s 36. The Employer's contribution is not covered under Section 36 as well as in the newly inserted Explanation 2 to section 43B. Accordingly, it may continue to enjoy the benefit of section 43B.

The wordings of the captioned Explanation indicate that the clarification is retrospective in nature.

In view of the above discussion the action of the Assessing Officer disallowing the sum of Rs.12,38,435/- on account of delayed payment of Employees Contribution to PF/ESI by invoking the provision of Section 2(24)(X) r.w.s. 36(1)(va) is upheld. The addition made by the AO is confirmed."

8. I find that the issue is covered by the judgement of Hon'ble Delhi High Court rendered in the case of AIMIL Ltd. (supra) wherein it has been held:-

17. "We may only add that if the employees' contribution is not deposited by the due date prescribed under the relevant Acts and is deposited late, the employer not only pays interest on delayed payment but can incur penalties also, for which specific provisions are made in the Provident Fund Act as well as the ESI Act. Therefore, the Act permits the employer to make the deposit with some delays, subject to the aforesaid consequences. Insofar as the Income Tax Act is concerned, the assessee can get the benefit if the actual payment is made before the return is filed, as per the principle laid down by the Supreme Court in Vinay Cement (supra)."

9. Further, Hon'ble Delhi High Court in the case of *PCIT vs Pro Interactive Service (India) Pvt.Ltd. in ITA No.983/2018 [Del.]* order dated 10.09.2018 held as under:-

"In view of the judgement of the Division Bench of Delhi High Court in Commissioner of Income Tax versus AIMIL Limited, (2010) 321 ITR 508 (Del.) the issue is covered against the Revenue and, therefore, no substantial question of law arises for consideration in this appeal.

The legislative intent was/is to ensure that the amount paid is allowed as an 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(23)(x) of the Act."

Therefore, respectfully following the ratio laid down by the Hon'ble Jurisdictional High Court in the above-mentioned binding precedents, I hereby direct the Assessing Officer to delete the disallowance. Thus, grounds raised by the assessee are allowed.

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

Order pronounced in the open Court on 22nd February, 2022.

Sd/-

**(KUL BHARAT)
JUDICIAL MEMBER**

Amit Kumar

Copy forwarded to:

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

ASSISTANT REGISTRAR
ITAT, NEW DELHI