

INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "B": NEW DELHI

BEFORESHIR **R. K. PANDA**, ACCOUNTANT MEMBER
AND
SHRI N. K. CHOUDHRY, JUDICIAL MEMBER

ITA No. 5613/Del/2017
(Assessment Year: 2013-14)

Ernst & Young Service Pvt. Ltd, 6 th Floor, Worldmark 1, Asset Area, 11, Hospitality District, IGI Airport, New Delhi PAN: AACCP8967E (Appellant)	Vs.	ACIT, Circle-8(2), New Delhi (Respondent)
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Assessee by :	Shri Nageshwar Rao, Ld. Adv Ms. Viyushti Aggarwal, Ld. Adv
Revenue by:	Shri Harpal Singh Kharab, Sr. DR
Date of Hearing	05/01/2022
Date of pronouncement	24/02/2022

O R D E R

PER N.K. CHOUDHRY, J. M.:

1. The Assessee has preferred the instant appeal against the order dated 16.09.2021 10-07-2017 impugned herein passed by the Ld. Commissioner of Income Tax-3 Delhi (is short 'Ld. Commissioner ', for the assessment year 2013-14 u/s.250 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act'), whereby the Ld. Commissioner sustained the disallowance of Rs. 23,48,801/- qua employee's contribution to the PF .

2. The issue involved in the instant appeal relates to the deposit of employees' contributions qua PF after the due date as prescribed in the relevant Act, however, before the due date of filing of return of income u/s.139(1) of the Act, which resulted into addition of Rs. 23,48,801/- made by the AO on account of disallowance .

3. The said disallowance was challenged by the Assessee before the CIT(A) who vide impugned order, sustained the same.

4. Being aggrieved, the Assessee is in appeal 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 upholding the disallowance/addition qua employee's contributions towards PF, mainly focused on the sole aspect i.e. non-applicability of the provisions of Section 43B of the Act to the employee's share qua PF .

6. The Assessee before the Id. Commissioner claimed, as the Assessee has deposited the employee's contribution towards PF 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.

7. On the contrary Ld. DR refuted the claim of the Assessee and relied upon various judgments of the Hon'ble High Courts against the contention and claim of the Assessee, such as in the case of Gujarat State Road Transport Corporation Ltd. {Tax Appeal no. 637 of 2013 reported in [2014] 41 taxmann.com 100(Gujarat) , CIT VsMerchem Ltd. (2015) 378 ITR 443(Kerala) and Unifac Management Services(India) P. Ltd. (2018) 100 taxmann.com 2414(Madras) .

8. 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.*'

9. 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.

10. 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.

11. Jurisdictional High Court as well, in the case of CIT Vs. AIMIL Ltd (supra) affirmed the action of the ITAT, in deleting the addition made by the Assessing Officer under Section 36(1)(va) of the Act, on account of employees' contributions qua Provident Fund and ESI, deposited before the due date of filing of return.

12. 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.*

13. 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, the 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 is un-sustainable.

14. In view of the above discussions, the disallowance to the tune of Rs. 23,48,801/- made by the AO for the assessment year under consideration and confirmed by the CIT(A) is not sustainable and, hence, the same stands deleted.

15. In the result appeal filed by the Assesses is allowed.

Order pronounced in the open court on 24/02/2022.

-Sd/-
(R. K. PANDA)
ACCOUNTANT MEMBER

-Sd/-
(N.K. CHOUDHRY)
JUDICIAL MEMBER

Dated: 24/02/2022

A K Keot

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1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi