

आयकर अपीलीय अधिकरण, चण्डीगढ़ न्यायपीठ "एस.एम.सी" , चण्डीगढ़
IN THE INCOME TAX APPELLATE TRIBUNAL, CHANDIGARH BENCHES, "SMC" CHANDIGARH

श्री एन.के.सैनी, उपाध्यक्ष
BEFORE: SHRI. N.K.SAINI, VICE PRESIDENT

आयकर अपील सं./ ITA No. 11 /Chd/2022
निर्धारण वर्ष / Assessment Year : 2018-19

M/S Freaking Amazing Foods Private Limited H.No. 1578, Sector 7C, Chandigarh-160019	बनाम	The ITO Ward 1(3), Chandigarh
स्थायी लेखा सं./PAN NO: AACCF2771J		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारित की ओर से/Assessee by : Shri Parikshit Aggarwal, CA
राजस्व की ओर से/ Revenue by : Smt. Priyanka Dhar, Sr. D.R
सुनवाई की तारीख/Date of Hearing : 14/03/2022
उद्घोषणा की तारीख/Date of Pronouncement : 14/03/2022

आदेश/Order

PER N.K. SAINI, VICE PRESIDENT

This is an appeal by the assessee against the order dt. 29/12/2021 of the Ld. CIT(A), National Faceless Appeal Centre (NFAC), Delhi.

2. Following grounds have been raised in this appeal.

1. That on the facts, circumstances and legal position of the case, the Worthy CIT(A), Chandigarh-1/10041/2019-20 has erred in passing the order in contravention of the provisions of S. 250(6) of the Income Tax Act, 1961.

2. That on law, facts and circumstances of the case, the Worthy CIT(A) has erred in confirming the action of Ld. AO in making addition of Rs. 93,877/- u/s 36(1) (va) (Employee share of contribution) of the Act even when the appellant company deposited whole of such amount on or before the due date of filing of ITR.

3. That on law, facts and circumstances of the case, the Worthy CIT(A) has erred in confirming the action of Ld. AO in making addition of Rs. 1,34,303/- u/s 36(1) (va) (Employer share of contribution) of the Act even when the appellant company deposited whole of such amount on or before the due date of filing of ITR and even otherwise the same was covered u/s 43B and not u/s 36(1) (va).

4. That on law, facts and circumstances of the case, the Worthy CIT(A) has erred in confirming the action of Ld. AO in making addition of Rs. 2,28,180/- u/s 36(1) (va) of the Act even when the Ld. AO lacked powers to make such addition in the assessment order passed u/s 143(1).

5. That the appellant craves leave for any addition, deletion or amendment in the grounds of appeal on or before the disposal of the same.

3. The only grievance of the assessee relates to the disallowance of Rs. 2,28,180/- made by the A.O. on account of late payments towards EPF and ESI under section 36(1)(va) of the Income Tax Act, 1961 (for short the 'Act'), however, before furnishing the return of income under section 139(1) of the Act. When the matter was taken to the Ld. CIT(A) the said disallowance was sustained.

4. Now the assessee is in appeal.

5. The contention of the Ld. Counsel for the assessee was that the issue under consideration is squarely covered vide common order dated 20/10/2021 passed by the ITAT, Chandigarh Bench in ITA Nos.191 & 192/Chd/2021 for the assessment years 2017-18 & 2018-19 in the case of Raja Ram Vs. ITO, Yamunanagar and in the case of Sanchi Management Services Private Limited Vs. ITO, Chandigarh in ITA No. 190/Chd/2021 for the A.Y. 2018-19.

6. In her rival submissions, the Ld. Sr. DR strongly supported the orders of the authorities below and reiterated the observations made by the Ld. CIT(A) in the impugned order.

7. I have considered the submissions of both the parties and perused the material available on record. In the present cases, it is noticed that an identical issue having similar facts has already been adjudicated by the ITAT, Chandigarh Bench in the aforesaid referred to cases, wherein one of us is author of the order dated 20/10/2021.

In the said order it has been held vide paras 8 to 10 in ITA Nos.191&192/Chd/2021 in case of Raja Ram Vs. ITO, Yamunanagar as under:-

8. I have considered the submissions of both the parties and perused the material available on record.

9. In the present cases, it is noticed that an identical issue having similar facts has already been adjudicated by the ITAT, Jodhpur Bench in the aforesaid referred to case, wherein the undersigned is author of the order dated 28.09.2021 and it has been held vide paras 7 to 10 in ITA in ITA Nos.71 & 72/Jodh/2021 as under:-

"7. We have considered the submission of both the parties and perused the material available on record.

8. In the present cases, it is not in dispute that the assessee deposited the contribution of PF & ESI belated 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.

8.1 Identical issue with the similar facts have already been adjudicated by the various Benches of the ITAT.

8.2 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."

9. 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 foregoing 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."

10. 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 hold 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 assesseees 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 VidyutVitrans Nigam Ltd. (supra), CIT vs. Udaipur DugdhUtpadakSahakariSangh 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' 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. "

11. Since the facts of the present cases are identical to the facts involved in the aforesaid referred to cases, therefore respectfully following the earlier orders as referred to herein above of the different Benches of the ITAT, the impugned additions made by the Assessing Officer and sustained by the Ld. CIT(A) on account of deposits of employees contribution of ESI & PF prior to filing of the return of income u/s 139(1) of the Act, in both the years under consideration prior to the amendment made by the Finance Act, 2021 w.e.f. 1.4.2021 vide Explanation 5, are deleted.

12. In the result, both the appeals of the assesseees are allowed."

10. So respectfully following the aforesaid referred to order of the Coordinate Bench of the Tribunal, the disallowances sustained by the Ld. CIT(A) are deleted.

8. Since the facts involved in the present case are identical to the facts involved in the case of Raja Ram Vs. ITO, Yamunanagar (supra). So respectfully following the aforesaid referred to order of the Coordinate Bench of the Tribunal, the disallowances sustained by the Ld. CIT(A) is deleted.

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

(Order pronounced in the open Court on 14/03/2022)

Sd/-
एन.के.सैनी,
(N.K. SAINI)
उपाध्यक्ष / VICE PRESIDENT

AG

Date: 14/03/2022

आदेश की प्रतिलिपि अग्रेषित/ Copy of the order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकर आयुक्त/ CIT
4. आयकर आयुक्त (अपील)/ The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय आधिकरण, चण्डीगढ़/ DR, ITAT, CHANDIGARH
6. गार्ड फाईल/ Guard File